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In The
Supreme Court of the United States

October Term, 1996

OLLIE DAILEY,
Petitioner,

vs.

LTV AEROSPACE AND DEFENSE COMPANY,
Respondent.

Consolidated with

OLLIE DAILEY,
Petitioner,

vs.

VOUGHT AIRCRAFT COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

# PETITION FOR A WRIT OF CERTIORARI

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66 pp

## QUESTIONS PRESENTED

The District Court systematically dismissed in *Dailey I*, both with and without prejudice, or refused to allow Petitioner to join, all of his legal claims which were dependent on the same facts as the equitable claims already pending before it, found there was a genuine issue of fact as to his equitable claims, tried them before the court, and then at the same time applied the doctrines of collateral estoppel and res judicata to dismiss the legal claims brought in separate suits before judgment had been rendered in *Dailey I*. The legal claims were all excluded because the District Court had determined the administrative prerequisites necessary to his Title VII and ADA claims had not been exhausted or initiated in a timely manner. Petitioner contends the District Court was in error in its decisions regarding whether Petitioner had exhausted the administrative prerequisites to bringing suit over his legal claims, and that but for this erroneous dismissal of his legal claims, he would have been entitled to a jury trial on all issues common to both his legal and equitable claims because his legal claims were part of a continuing violation spanning the effective date of the Civil Rights Act of 1991. If in fact the District Court was in error in not allowing any of Petitioner's legal claims to be joined with his equitable claims, then according to this Court's holding in *Lytle v. Household Mfg., Inc.*[1], he has been deprived of his constitutional right to a jury trial and the only remedy is to reverse and remand both his equitable and legal claims for a jury trial on all common issues. Whether the District Court was in error in its determination that Petitioner had failed to meet the administrative prerequisites to bringing his legal claims, or in later finding Petitioner and his counsel had brought duplicative or frivilous claims in *Dailey II* and *Dailey III*, depends on this Court's answers to the following:

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1 110 S.Ct. 1331 (1990).

**Question No. 1:** Must a plaintiff return to the EEOC to complain about each act of retaliation in a continuing violation of alleged race discrimination and retaliation before it can be said he has met the administrative prerequisites necessary to join subsequent acts of discriminaton and retaliation with those identical or similar charges already pending before the court?

**Question No. 2:** Is the timely filing of a claim of discrimination with another federal agency other then the EEOC sufficient filing in place of a filing with the EEOC, when the other agency had concurrent jurisdiction over the employer involved, the charge is based on the same allegations, and the only reason the claim was not referred to the EEOC was because of the federal agency's bureaucratic ineptitude?

**Question No. 3:** Must a plaintiff continue attempts at conciliation well after 180 days have passed since the filing of his EEOC charge, a right to sue letter has been received, and prior conciliation efforts by a federal agency acting as the EEOC's agency have been unsuccessful, before it can be said he has exhausted the administrative prerequisites to coming before the court?

**Question No. 4:** If a plaintiff is able to timely cure any alleged failures to exhaust the administrative prerequisites after dismissal from suit, may they be brought in a subsequent suit prior to judgment being rendered in the first without the doctrines of res judicata and collateral estoppel being applied to the subsequent suits in which the plaintiff brought the claims only after trying to join them in the first suit, being denied due to nearness to trial, and when the opposing party did not file a plea of another cause pending or move to consolidate the cases when they were brought in the subsequent suits?

**Question No. 5:** When the only reason the District Court was able to try a plaintiff's equitable claims before his legal claims with common issues, was due solely to the District Court's erroneous dismissal of the plaintiff's legal claims, has the plaintiff been deprived of his constitutional right to a jury trial on all common issues?

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Ollie Dailey, respectfully petitions for a writ of certiorari to review the judgment the Fifth Circuit Court of Appeals entered on March 13, 1996, and the subsequent denial of his Suggestion for Rehearing En Banc, treated as a

Petition for Rehearing, on June 14, 1996 both of which affirmed the District Court's decisions listed below.

## OPINIONS BELOW

On November 4, 1993 the District Court entered an Order in *Dailey I* denying Petitioner's Motion for Leave to Amend and striking Petitioner's Final Supplemental Complaint in which he alleged his 1993 layoff was another act of race discrimination and retaliation in the course of a continuing violation encompassed in the charge already before the court in which Petitioner alleged that his employer had been refusing to allow him to return to work since October, 1990 because of his race and in retaliation for his having engaged in protected activities. (App., *infra*, 1a).

On November 9, 1993 the District Court issued a Memorandum Order & Opinion in *Dailey I* dismissing without prejudice Petitioner's ADA claim arising out of an October, 1992 refusal to return him to work so that additional attempts at conciliation could take place. (App., *infra*, 2a-10a).

On December 14, 1993 the District Court issued a Memorandum Order & Opinion in *Dailey I* denying Petitioner's Second Motion for Leave to Amend to include his race discrimination and retaliation claims arising out of his 1993 layoff and stated that those claims would have to be brought in a separate suit due to nearness to trial. (App., *infra*, 11a-12a).

On December 17, 1993 the District Court issued a Memorandum Order & Opinion in *Dailey I* removing Petitioner's case from the jury docket as not being subject to the Civil Rights Act of 1991 because there were no post '91 Act claims pending before it. (App., *infra*, 13a-15a).

Also on December 17, 1993 the District Court issued a Memorandum Order & Opinion in *Dailey I* denying Petitioner's Motion to Reconsider its November 9, 1993

Memorandum Order & Opinion dismissing his ADA claims over the October, 1992 refusal to return him to work. (App., *infra*, 16a-19a).

On January 6, 1995 the District Court entered its Findings of Fact and Conclusions of Law and Judgment in *Dailey I* finding no race discrimination or retaliation as a result of the initial claim that Petitioner's employer had been refusing to allow him to return to work since October, 1990.

On January 18, 1995 the District Court entered its Memorandum Order & Opinion in *Dailey I* denying Petitioner's Motion for Reconsideration of the Findings of Fact and Conclusions of Law and Judgment entered on January 6, 1995. (App., *infra*, 20a).

Also on January 6, 1995 the District Court entered an Order in *Dailey II* dismissing the 1993 layoff claims which had been brought in a separate suit in accordance with the District Court's December 14, 1993 ruling in *Dailey I* on the grounds that these claims were no different from those brought in *Dailey I*. (App., *infra*, 21a-22a).

Also on January 6, 1995 the District Court in *Dailey III* dismissed Petitioner's claims of race discrimination and retaliation under Title VII and 42 U.S.C. Sec. 1981 arising out of the refusal to return him to work in October, 1992 on the basis that these claims were the same brought in *Dailey I* or could have been brought in *Dailey I*. (App., *infra*, 23a-25a).

Also on January 6, 1995 the District Court in *Dailey II* and *Dailey III* entered an order imposing sanctions against Petitioner and his counsel for having brought frivolous and duplicative claims by bringing in *Dailey II* and *Dailey III* his Title VII and 42 U.S.C. Sec. 1981 claims arising out of the October, 1992 refusal to return him to work and the July, 1993 layoff on the basis that these claims had been brought in *Dailey I*. (App., *infra*, 26a-29a).

On April 12, 1995 final judgment was entered in *Dailey II* and *Dailey III* with the exception of Petitioner's October,

1992 ADA claim which was severed and remained with the District Court for later disposition. (App., *infra*, 30a).

## STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals affirmed the District Court's decisions on March 13, 1996. (App., *infra*, 31a-35a). It denied Petitioner's Suggestion for Rehearing En Banc which was treated like a Petition for Rehearing on June 14, 1996 without decision. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257.

## CONSTITUTIONAL PROVISIONS

Seventh Amendment to the United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## STATEMENT OF THE CASE

Prior to bringing suit Petitioner had been actively participating in the picketing of his employer together with his co-workers over alleged systemic race discrimination. Although a class action complaint filed with the Department of Labor was able to find 11 individuals who had been discriminated against in promotions, there was no finding of systemic discrimination ultimately made. Petitioner was also active in union politics and campaigned for a union position. While doing so, his campaign literature was defaced with the word "Nigger." Petitioner took this problem to the Superintendent of his Department, Mr. Gerald Skinner.

While they were discussing this problem, Mr. Skinner without explanation voluntarily informed Petitioner that he did not believe in mixed marriages, that he would never allow his daughter to marry a black man, and that if the whites and blacks kept marrying each other pretty soon they would all be a bunch of Mexicans. As a result of his admission to having made these statements, Mr. Skinner was suspended for three days. Three weeks later, Petitioner came to work as he had always done for the previous 6 years, but for the first time could not locate his big red mechanic's tool box. Eventually he was able to find it where it had been pushed up against the wall and covered over with trash. Having been prodded and out of frustration, Petitioner yelled out to no one in particular "someone better tell these ----ing white boys to leave my stuff alone." Petitioner was immediately suspended after being told his giving a statement about what had happened would not change their mind. When he returned to work, Petitioner was told that his employer no longer had any work for him within the 20 pound lifting restrictions he had as a result of an on the job injury occurring in January, 1990. Petitioner could do his job regardless of the weight involved as long as he was assigned to one of 20-25 machines which had working hoists, and was not assigned to one of the five machines without working hoists whenever the assignment involved lifting something over 20 pounds or required he stoop or bend.

Petitioner timely filed an EEOC charge of race discrimination and retaliation under Title VII alleging that his employer was using his disability as a pretext for keeping him off work when he was in fact capable of working whether his employer had work within his lifting restrictions or not. Petitioner believed he was being kept off work because of his race and in retaliation for his having engaged in protected activities, including, most recently complaining about his Superintendent's racist comments during his consideration of Petitioner's complaints about his campaign literature having been defaced with the word "Nigger."

Upon receiving his right to sue letter, Petitioner originally brought suit against his employer on December 20, 1991 when he filed his First Amended Complaint and Jury Demand in *Dailey I* (Civil Action No. 3:91-CV-1327-X) joining the employer as a party. Petitioner alleged in *Dailey I* that his employer had discriminated against him because of his race and that it retaliated against him for having engaged in protected activities when on October 16, 1990 he was suspended and then on October 22, 1990 not allowed to return to work allegedly because his disability prohibited him from being able to do his job when in fact he could do his job with minor accommodation. On March 9, 1993 Petitioner filed with leave of court his Second Amended Complaint and Jury Demand joining additional claims of race discrimination and retaliation, as well as, disability discrimination under the ADA over a second refusal to return him to work occurring on October 6, 1992[1]. On May 28, 1993 Petitioner filed his Final Supplemental Complaint without leave of the court to join additional claims of race discrimination, disability discrimination, and retaliation over his having been notified during a multiple-day video taped deposition he would be laid off effective July, 1993. Said notification was given within days of the Department of Labor having notified him that it had determined his employer could accommodate him and that it had to return him to work. The decision to lay off Petitioner was made by Mr. Skinner on May 20, 1993, the same day Petitioner's employer had met with the Department of Labor, been told they had no right to appeal its decision, would have to return Petitioner to work, and were invited to attempt conciliation. It has been Petitioner's claim that the layoff itself was specifically motivated to avoid having to put

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1 Petitioner had been informed that a white machinist with a disability restricting the amount of weight that could be lifted had been offered a position, and again made an effort to return to work, but was refused again.

him back to work, and that but for that motivation he nor any of the employees laid off at that time would have been laid off at that time. On June17, 1993 Petitioner filed his Motion for Leave to File the Final Supplemental Complaint he had previously filed without leave of the District Court.

On September 7, 1993 the District Court dismissed Petitioners claims in so far as they sought relief under the Civil Rights Act of 1991 (hereinafter the "91 Act"). On November 4, 1993 the District Court denied Petitioner's Motion for Leave to File his Final Supplemental Complaint over his 1993 layoff and struck the Final Supplemental Complaint on the basis that the claims made therein were too remote in time and substance from those informing his complaint and that they had never been submitted to the EEOC. (App., *infra*, 1a). Petitioner argued under these facts the claim was not too remote, and that as a repeat of the same retaliatory act, i.e., refusal to return him to work, already pending before the District Court, he need not return to the EEOC before bringing his claim in court. On November 9, 1993 the District Court dismissed without prejudice Petitioner's ADA claims arising out of the October, 1992 refusal to return him to work on the basis that his employer was attempting conciliation with the Department of Labor on claims arising out of the same incident under the Rehabilitation Act of 1973. (App., *infra*, 2a-10a). In the same order the District Court determined there was a genuine issue of fact under Title VII as to why Petitioner had been kept off work beginning October, 1990. On November 16, 1993 Petitioner filed a Motion for Reconsideration of its decision to dismiss the October, 1992 ADA claims arguing his employer had no right to further conciliation efforts in that the Department of Labor had been unsuccessful in conciliating the ADA claims after several months and had deferred the claim to his lawsuit since the EEOC had already issued a right to sue letter. On December 6, 1993, having timely gone back to the EEOC to cure any alleged administrative defect

surrounding his 1993 layoff, Petitioner filed his Second Motion for Leave to File Plaintiff's Final Supplemental Complaint. On December 14, 1993 the District Court ruling on Petitioner's Second Motion for Leave to File his Final Supplemental Complaint held that it was too late to interject the July, 1993 layoff claims and that they would have to be brought in a separate suit. (App., *infra*, 11a-12a). On December 17, 1993 the trial court, ruling on Petitioner's November 16, 1993 Motion for Reconsideration of its decision to dismiss the October, 1992 ADA claims for further conciliation, denied the Motion for Reconsideration stating still further efforts at conciliation with the EEOC were required. (App., *infra*, 16a-19a). The District Court reasoned that it was too late to interject a new claim in a case a month from trial and that since the EEOC was willing to conduct further conciliation efforts over this issue, he was denying the Motion for Reconsideration of his dismissal of the October, 1992 ADA claims. Also on December 17, 1993 the District Court removed *Dailey I* from the jury docket finding that there were no post '91 Act claims supported by an EEOC charge before it, and that since Petitioner had failed to file an EEOC charge alleging race discrimination and retaliation over the October, 1992 refusal to return him to work when he had filed his ADA charge over the same incident, that incident could not serve as the basis for a post '91 Act Title VII claim either. (App., *infra*, 13a-15a). Petitioner argued that as a repeat of the same act of retaliation, i.e., refusal to return him to work, he need not return to the EEOC before bringing this claim. Petitioner also argued that he had filed this claim at the time of the incident with the Department of Labor which had failed to refer it to the EEOC as it was required to do when claims of both disability discrimination and race discrimination are filed with it.

*Dailey I* went to trial January 4 through January 7, 1994. Prior to trial the District Court had determined it would only allow 2 days for trial. After hearing some testimony, the

District Court decided the parties could take the time needed to try the case. During trial the District Court attempted to get the parties to settle and in the process the District Court warned Petitioner not to be "greedy" and instructed him that it was better to settle a case then face years of appeals. A $100,000.00 offer was made which Petitioner turned down.

On February 18, 1994 Petitioner filed *Dailey II* (Civil Action No. 3:94-CV-325) bringing in it his race discrimination and retaliation claims arising out of the July 1993 layoff which the District Court had specifically said he would have to bring in a separate suit from *Dailey I*. Petitioner alleged he was laid off in continued furtherance of its discriminatory refusal to return him to work after being ordered to do so by the Department of Labor and to cut off the lost wages his employer was being made to pay by the Department of Labor. Petitioner again alleged this was simply another incident of his employer's refusal to allow him to return to work because of his race and his having engaged in protected activities.

After Petitioner had returned to the EEOC as ordered by the District Court in *Dailey I* on his October, 1992 ADA claims for further conciliation he amended his EEOC charge which had been reopened by the EEOC to include claims of race discrimination and retaliation under Title VII over the same incident. When the additional conciliation was unsuccessful and a right to sue letter was received over the October, 1992 incident, Petitioner moved to amend his complaint on April 28, 1994 in *Dailey II* to include his ADA and Title VII claims over this incident, as well as, a claim under 42 U.S.C. Sec. 1981 over the same incident. Concerned about the 90 day limitations period, Petitioner withdrew this Motion to Amend when it was not ruled upon by the court in *Dailey II* and filed a third suit, *Dailey III* (Civil Action No. 3:94-CV-1214) on June 13, 1994 including his Title VII and ADA, as well as, 42 U.S.C. Sec. 1981 claims over the October, 1992 refusal to return him to work. *Dailey*

*II* and *Dailey III* were transferred to the Judge handling *Dailey I* and were later consolidated.

A year after trial in *Dailey I*, on January 6, 1995, the District Court rendered its Findings of Fact and Conclusions of Law and Judgment holding that the employer's refusal to allow him to return to work in October, 1990 was not motivated by race discrimination or retaliation for his having engaged in protected activities. Petitioner filed a Motion for Reconsideration on January 17, 1995 which was denied on January 18, 1995. On February 16, 1995 Dailey filed his Notice of Appeal over the various decisions made in *Dailey I*.

Also on January 6, 1995 the District Court in *Dailey II* simultaneously dismissed Petitioner's claims that he had been laid off in July, 1993, due to his race and in retaliation for his having engaged in protected activities on the basis that they had already been litigated in *Dailey I* and were duplicative. (App., *infra*, 21a-22a). Contrary to the District Court's statement, it had not litigated this claim in *Dailey I*, but had specifically told Petitioner to bring it in another suit. Additionally, on January 6, 1995 the District Court dismissed Petitioner's Title VII and 42 U.S.C. Sec. 1981 claims over the October, 1992 incident on in *Dailey III* on the grounds that the Title VII claim had already been decided in *Dailey I* as not having been filed with the EEOC in time and on the grounds that the 42 U.S.C. Sec. 1981 claims could have been brought in *Dailey I*. (App., infra, 23a-25a). The District Court failed to recognize that by forcing the ADA charge over the October 1992 incident to be reopened by the EEOC it had opened the door for Petitioner to timely amend his charge to include the Title VII claim. As such something had occured since the District Court had determined in *Dailey I* that it was too late for Petitioner to file a charge of race discrimination with the EEOC over the October, 1992 incident which changed that fact. Also on January 6, 1995 the District Court found Petitioner and his counsel jointly and severally liable for sanctions in *Dialey II* and *Dailey III* for bringing his Title VII

and 42 U.S.C. Sec. 1981 claims over the October, 1992 refusal to return him to work and for bringing his Title VII claims over the July, 1993 layoff finding these claims had been specifically and thoroughly litigated before the court in January, 1994 and dismissed in his December 17, 1993 Order. (App., *infra*, 26a-29a). As such it was determined Petitioner was barred from bringing these claims under the doctrines of res judicata and collateral estoppel. On January 18, 1995 the District Court denied Petitioner's Motion for Reconsideration of its decisions in *Dailey II* and *Dailey III*.

On April 12, 1995 the District Court severed Petitioner's Title VII and 42 U.S.C. Sec. 1981 claims over the October 1992 and July 1993 incidents in *Dailey II* and *Dailey III* from his ADA claims over the October, 1992 incident and entered final judgment on the race discrimination and retaliation claims. (App., *infra*, 30a).

Petitioner timely gave notice of appeal in *Dailey I* and the consolidated *Dailey II* and *Dailey III* case. On July 10, 1995 the Fifth Circuit Court of Appeals consolidated these two appeals. Petitioner argued on appeal that the District Court had erroneously dismissed or not allowed him to join several post '91 Act claims and that in doing so he had been deprived of his right to a jury trial on his pre '91 Act claims involving common issues. On March 13 1996 the Court of Appeals affirmed the District Court's decisions in all respects in its own summary decision. (App., *infra*, 31a-35a). In its decision the Court of Appeals found that "through piecemeal filings with the Equal Employment Opportunity Commission ("EEOC") over a period of several years on some charges, and failure to file with the appropriate administrative agency on others, [Petitioner] created a legal and procedural morass for the trial court." It further stated, that "the district court maneuvered through that morass with precision", and then affirmed in all respects the judgments and rulings of the district court that were the subject of appeal. The Court of Appeals failed to discuss a single point of error argued on

appeal and cited no law, let alone anything contrary to the law cited by Petitioner in support of his legal arguments.

Petitioner acknowledges that this case is a procedural morass as stated by the Court of Appeals, but he disputes its determination that he is the cause of the morass. Petitioner merely followed the law as set out by the Court of Appeals as regards the administrative prerequisites which must be met before he could bring his additional claims of retaliation arising out of the same circumstances as those already pending before the District Court. If his claims were "piecemeal" it was only because all of the incidents of which Petitioner complains did not occur at the same time, but at different intervals during the course of the litigation in *Dailey I*, and because of the improper and unnecessary administrative procedures the District Court required he go through in order to bring his claims in court. The District Court and the Court of Appeals have repeatedly painted Petitioner and his counsel in a poor light unfairly attributing an evil motive to almost every action taken during the course of the litigation involved. There is nothing in the record which would even come close to supporting a claim that Petitioner and his counsel did anything without a legitimate argument based in the law or in bad faith. To the contrary, Petitioner has attempted to manuever through a maze of administrative and judicial requirements by the District Court on claims that were clearly meritorious claims. Petitioner questions why it is he who is turned into the villain in this case when it is his employer who allowed his campaign literature to be defaced with the word "Nigger", when it is the Superintendent of his department who doesn't know when to keep his personal beliefs that blacks and whites should not mix to himself, when it is his employer who has been found to have discriminated against other blacks, and when it is his employer who was found by the Department of Labor to in fact be able to accommodate his lifting restrictions without any problem. Petitioner and his counsel have quite simply been mistreated by the District

Court and the Fifth Circuit Court of Appeals has allowed this to occur.

## REASONS FOR GRANTING THE WRIT

### I.

### THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE BURDEN NECESSARY TO MEET THE ADMINISTRATIVE PREREQUISITES TO BRINGING SUIT OVER SUBSEQUENT INCIDENTS OF DISCRIMINATION AND RETALIATION IDENTICAL OR SIMILAR IN NATURE OR FACTS TO THOSE ALREADY PROPERLY PENDING BEFORE THE DISTRICT COURT IN A CONTINUING VIOLATION CLAIM; AN ISSUE THIS COURT HAS NOT ADDRESSED TO DATE.

Petitioner would contend this Court's resolution of the federal questions presented herein is pertinent and relevant to many cases other then just his. The Court's decisions on the questions presented would aid the lower courts in uniformly administering cases such as the instant one where there is already pending before the District Court a claim of a continuing violation of race discrimination and retaliation, and subsequent instances of the exact same retaliatory act, in this case, the refusal to return Petitioner to work, occur during the pendency of the litigation. The Court's consideration of the questions presented in this writ will prevent the sort of "procedural morass" which the Fifth Circuit Court of Appeals has unfairly laid at the hands of Petitioner in the instant case, but which was actually caused by the District Court requiring Petitioner to return to the EEOC every time his employer again retaliated against him by its repeated refusal to return him to work, even after being ordered to do so by the Department of Labor.

In the instant case, Petitioner had already brought in *Dailey I* a claim of race discrimination and retaliation over his employer's refusal to return him to work in October, 1990. While this suit was pending, Petitioner again attempted to return to work in October, 1992 when he learned a disabled white man had been offered a job in his department, and was again refused. When he was not allowed to return he filed a complaint under the ADA with the EEOC and a complaint alleging disability discrimination, race discrimination, and retaliation with the Department of Labor. Under these circumstances the Department of Labor was suppose to refer Petitioner's claim in its entirety to the EEOC; however, it did not do this. 29 C.F.R. Part 1641.5(e). Instead it investigated the disability claim eventually finding discrimination and sat on the race discrimination and retaliation claims. The EEOC in its own turn eventually issued a right to sue letter on the ADA part of the charge.

When Petitioner received his right to sue letter on the ADA claim he obtained leave of the District Court to amend his complaint in *Dailey I* which he did in March, 1993, to include a claim of race discrimination and retaliation under Title VII and of disability discrimination under the ADA over the October, 1992 refusal to return him to work. He argued there was a continuing violation spanning the '91 Act and that as such he was entitled to a jury trial on all common issues. Petitioner did not return to the EEOC to file another complaint of race discrimination because he already had the same exact claim arising out of the October, 1990 refusal to return him to work pending before the District Court, and the Fifth Circuit Court of Appeals had held that a claim of retaliation growing out of a charge already before the court could be pursued without exhausting administrative prerequisites to filing because the District Court has ancillary jurisdiction over the retaliation claims. Gupta v. East Texas State University, 654 F.2d 411, 413-14 (5th Cir. 1981), citing, Pettway v. American Cast Iron Pipe, Co., 411 F.2d

998, rehearing and rehearing en banc denied, 415 F.2d 1376 (5th Cir. 1969). This legal conclusion was again reached in Gottlieb v. Tulane University of Louisiana, 809 F.2d 278, 283 (5th Cir. 1987), see also, Silver v. Mohasco Corp., 602 F.2d 1083, 1090 (2nd Cir. 1979) and Steffen v. Meridian Life Ins., Co., 859 F.2d 534, 544 (7th Cir. 1988). Petitioner was simply arguing that his employer had again retaliated against him by again refusing to return him to work. There was no need for him to return to the EEOC under these circumstances.

The District Court later on November 9, 1993 dismissed without prejudice Petitioner's ADA claim over the October, 1992 incident on the basis that the Department of Labor was attempting conciliation of the same issue under the Rehabilitation Act of 1973. Petitioner argued that the employer had no right to further conciliation and that this claim should not be dismissed since it was already well beyond 180 days since he had filed his EEOC charge, he had already received a right to sue letter from the EEOC, and the Department of Labor had been attempting to conciliate this issue without success since it first determined his employer had been discriminating against him back in May, 1993, some six months before. When the Department of Labor issued a letter stating that it had been unable to conciliate the ADA aspect of the claim and was deferring it to *Dailey I* since the EEOC had already issued a right to sue letter, Petitioner again attempted to join the issue in *Dailey I*, but was told that still further conciliation was required with the EEOC. Petitioner has argued that while Title VII and the ADA encourage conciliation, it is not a right of a defendant. Gamble v. Birmingham S. R. Co., 514 F.2d 678, 688-9 (5th Cir. 1975). Additionally, if conciliation between the EEOC or its agent, the Department of Labor, and an employer fails, or if 180 days pass without the Commission entering into a conciliation agreement, the Commission must notify the charging party of the failure of conciliation and his right to bring suit. 42

U.S.C. Sec. 2000e-5(f)(1). By the time the District Court had initially dismissed the October, 1992 ADA claim from *Dailey I* in November, 1993, and denied Petitioner's Motion for Reconsideration in December, 1993, it was well over 180 days since Petitioner had filed his charge, and conciliation efforts had been going on for six months without success. Petitioner had already done everything which was required of him in order to invoke the District Court's jurisdiction. He had timely filed a charge, he had cooperated with the investigation, he had attempted conciliation with the Department of Labor acting as the EEOC's agent, and he had received a right to sue letter from the EEOC, as well as, the Department of Labor. 29 C.F.R. Sec. 1641.5(a); 41 C.F.R. Sec. 60-742.5(a). The District Court had, therefore, erroneously dismissed this claim even though it was dismissed without prejudice.

When the District Court determined in December, 1993 that Petitioner could not rely on the October, 1992 incident as a post '91 Act claim of race discrimination and retaliation it did so on the ground that Petitioner had failed to file a timely EEOC charge and that it was too late to do so. Petitioner argued that he need not return to the EEOC to file another charge alleging a repeat of the same retaliatory act already pending before the District Court. Gupta, supra. Thus, the District Court was in error when it dismissed Petitioner's claim that he had been racially discriminated against and retaliated against as a result of the October, 1992 refusal to return him to work. Being unsuccessful with this argument, Petitioner had the EEOC amend his charge to include a Title VII claim over the October, 1992 incident when it reopened his ADA charge over the same incident in accordance with the District Court's order requiring further conciliation. Petitioner had the Department of Labor refer the race discrimination and retaliation claim still pending before it, and which it had been sitting on, to the EEOC which then amended the charge to include his claim of race discrimination

and retaliation over the same incident. District Courts can hear claims arising from untimely charges if those claims "relate back" to allegations made in an earlier, timely charge. 29 C.F.R. Sec. 1601.12(b); Hicks v. ABT Associates, Inc., 572 F.2d 960, 966 (3rd Cir. 1978); Sanchez v. Standard Brands, Inc., 431 F.2d 455, 464 (5th Cir. 1970). When the District Court opened the door by ordering the ADA charge over the October, 1992 incident return to the EEOC for further conciliation, Petitioner had every right to amend his EEOC charge to include a claim of race discrimination and retaliation arising out of the same incident. Such charge would relate back to the original charge. Thus, even though the District Court may have conceivably been correct when it said in *Dailey I* that it was too late to file an EEOC charge alleging Title VII had been violated over the October, 1992 incident, by requiring the EEOC to reopen the ADA charge over the same incident, it had created a situation where it was no longer too late to file this charge.

The District Court's dismissal of Petitioner's July, 1993 layoff claims of race discrimination and retaliation was also erroneous since there was again no need for him to return to the EEOC to complain yet again that his employer was refusing to return him to work. Gupta, supra. Petitioner already had a claim of race discrimination and retaliation based in the employer's failure to return him to work pending before the District Court. This was simply an alleged repeat of the same exact act in a slightly different form. The District Court had concluded in *Dailey I* that the layoff was too remote from the charges pending before it. Petitioner would point out that this claim was identical to the one pending before the District Court, i.e., his employer would not let him return to work. Additionally, the decision to lay Petitioner off was made by the same person whom he had had suspended for making racist comments while addressing a complaint that his campaign literature was being defaced with the word "Nigger", and the decision was being made at the same time

the Department of Labor had informed the employer that it had no choice and had to return Petitioner back to work. It is clear there was at the very least a genuine question as to whether there was a causal connection between the layoff and the employer's initial decision not to allow Petitioner to return to work in October, 1990. Finally, Petitioner fails to see how it can be argued this claim was too remote from the charges pending before it when those charges were still pending before it when the layoff decision was made. It might be a different matter if the original claim had been dead for three years, but it had not been. When the District Court would not reconsider its position, Petitioner returned to the EEOC, it still being within 180 days of the discriminatory and retaliatory layoff, and filed a charge of discrimination and retaliation under Title VII. When he obtained his right to sue letter, Petitioner again returned to the District Court in *Dailey I* and sought leave to amend, but was denied specifically due to the fact the case was ready for trial. The District Court was in error in denying Petitioner the right to join these claims in *Dailey I* as they were not too remote from the charges then pending before it and even if he was required to file with the EEOC first, he had timely done so.

Since the District Court specifically told Petitioner that if he wanted to bring his claims over the July, 1993 layoff he would have to bring a separate suit, he did so and filed *Dailey II*. Petitioner contends such language by the District Court was equivalent to having dismissed the claim without prejudice.

By the time Petitioner had completed the additional conciliation efforts with the EEOC required by the District Court on the ADA October, 1992 claim, *Dailey I* had already gone to trial. Since the ADA claims had been dismissed without prejudice and his charge had been amended to include a claim of race discrimination and retaliation under Title VII while at the EEOC, Petitioner attempted to amend *Dailey II* to bring these claims. Out of misguided concern that the 90

days limitation period would become a problem if the claim were not actually filed within that period of time, Petitioner withdrew his Motion to Amend in *Dailey II* and filed his Title VII and ADA claims over the October, 1992 incident in *Dailey III*.

The District Court later dismissed from *Dailey II* and *Dailey III* all but Petitioner's ADA claims over the October, 1992 incident finding that it had already decided all other claims in *Dailey I* and that they were barred by the doctrines of res judicata and collateral estoppel. The District Court had not decided these issues; however, in *Dailey I*. The District Court had specifically declined to consider the October, 1992 Title VII claim in *Dailey I* because Petitioner had failed to file a charge with the EEOC. However, that charge was able to be amended when the EEOC reopened the ADA charge over the same incident for further conciliation as ordered by the District Court. Although the District Court had previously ruled it was too late for Petitioner to file a Title VII charge with the EEOC over this incident in *Dailey I*, its own act of forcing the EEOC to reopen the ADA charge over the same incident, opened the door for Petitioner to timely amend his charge to include the Title VII allegations. It was, therefore, not too late for Petitioner to amend his charge and bring this claim which was in fact not considered by the District Court in *Dailey I* because the District Court erroneously believed an EEOC charge had to be filed first. As for the Title VII claim over the July, 1993 layoff, that charge also was not finally resolved by the District Court in *Dailey I*. After Petitioner had returned to the EEOC to timely file his charge over this incident, he received his right to sue letter and returned to the District Court in *Dailey I* and again attempted to join the issue only to be told that it was too late because the case was ready for trial and that it would have to be brought in another suit. This issue was neither decided by the District Court in *Dailey I* nor was it dismissed with prejudice under these facts.

Petitioner had also brought a claim under 42 U.S.C. Sec. 1981 over the October 1992 refusal to return him to work in *Dailey III*. This was done in *Dailey III* rather then in *Dailey I* since the District Court had already refused to allow him to bring his Title VII claims over the same incident in *Dailey I* and had forced Petitioner to bring his claims in a separate suit. Since Petitioner was bringing his Title VII claims over the October 1992 incident in *Dailey III*, he decided to bring his 42 U.S.C. Sec. 1981 claims over the same incident in *Dailey III* as well. There was no point in splitting his two claims over the same incident between two suits. The District Court considered it frivolous of Petitioner and his counsel to bring the 42 U.S.C. Sec. 1981 claim in *Dailey III* when it could have been brought in *Dailey I*. Petitioner would contend; however, that since the District Court was requiring he bring his Title VII claims in a separate suit, he had the option of bringing the 42 U.S.C. Sec. 1981 claim in either suit, and it was not frivolous of him to bring it in the only suit the District Court had allowed his Title VII claims over the same incident to be brought in.

Because the District Court had erroneously concluded that all of Petitioner's race discrimination and retaliation claims brought in *Dailey II* and *Dailey III* had already been decided in *Dailey I*, it concluded that the claims were duplicative and frivolous and dismissed them from *Dailey II* and *Dailey III* and then sanctioned Petitioner and his counsel for bringing them. Said sanctions were improper because the claims brought in *Dailey II* and *Dailey III* were not duplicative and had not been decided by the District Court in *Dailey I*. The only thing that had been decided in *Dailey I* were the disputed issues as related to the employer's initial refusal to return him to work in October, 1990, although the claim in *Dailey I* did in fact raise common issues with those claims raised in *Dailey II* and *Dailey III*. In so doing the District Court incorrectly applied its findings of fact in *Dailey I* to the legal claims which the District Court had erroneously

separated out of *Dailey I*, both with and without prejudice, and which were then properly brought in separate suits. It was only the District Court's erroneous dismissal of all of Petitioner's legal claims, or post '91 Act claims, which enabled the District Court to resolve issues common to both his equitable, or pre '91 Act claims, and his post '91 Act claims; issues that would have otherwise been resolved by a jury. This Court has clearly stated that in cases such as this where the District Court erroneously tries equitable claims before legal claims raising common issues, collateral estoppel effect will not be accorded to the District Court's factual findings, but instead, each case in its entirety must be reversed and remanded for a trial before a jury. Lytle v. Household Mfg., Inc., 110 S.Ct. 1331, 1336-1337 (1990). But for the District Court's erroneous dismissal of all of his legal claims on the grounds that he had failed to meet the administrative prerequisites to bringing suit, Petitioner would have been entitled to a jury trial on all issues tried in *Dailey I* since those issues were the same as those on which his legal claims were based. Likewise, but for the District Court's erroneous application of the doctrines of collateral estoppel and res judicata to Petitioner's legal claims, he would not have been subjected to sanctions and he would have been entitled to a jury trial on those claims.

## II.

**THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED FEDERAL QUESTIONS IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, AS WELL AS ITS OWN, AND SUCH ACTION CALLS FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

Petitioner contends as previously explained that the District Court has methodically, and contrary to Fifth Circuit law, eliminated each and every one of Petitioner's legal claims in order to deprive him of a jury trial on his clearly meritorious claims of race discrimination and retaliation against his employer, and then deprived him of his right to a jury trial by according collateral estoppel and res judicata effect to its decisions and findings of fact on the equitable claims to Petitioner's legal claims. This Court has clearly stated this may not occur. The Fifth Circuit Court of Appeals has therefore by affirming the District Court's decisions, decided a federal question in a way that conflicts with the decisions of this Court, as well as, its own decisions since it has clearly stated a plaintiff need not return to the EEOC on claims of retaliation related to or arising out of the charges already pending before the court. Such acts call for an exercise of this Court's power of supervision.

## III.

## THIS COURT SHOULD GRANT CERTIORARI ON THE QUESTIONS PRESENTED BECAUSE THEY ARE IMPORTANT.

The District Court has been allowed to deprive Petitioner of his right to a jury trial on every one of his post '91 Act claims and in the process been allowed to unfairly blame Petitioner for the procedural complications in this case. It is not Petitioner who has created the procedural complications in this case. Petitioner originally brought all of his claims in one case in a timely fashion and filed with the EEOC when the law required he do so, and did not file when the law did not require he do so. The District Court then forced Petitioner to take additional administrative prerequisites which he should not have been required to take and which served no purpose but to create the procedural mess

Petitioner is now accused of creating. Petitioner would contend that the District Court's actions were taken with the specific intent of depriving him of his constitutional right to a jury trial on his legal claims and all issues common to those claims and his equitable claims. This Court's denial of this writ will be the same as this Court's support of the District Court's and the Court of Appeal's deprivation of Petitioner's constitutional right to a jury trial since this Court has held that it would be anomalous to hold that a District Court can deprive a litigant of his right to a jury trial by deciding an equitable claim before a jury hears a legal claim dependent on common issues, but that a District Court may accomplish the same result by erroneously dismissing the legal claim. Lytle, supra. This Court has determined this would be unfair because the litigant is required to join his legal and equitable claims in order to avoid the doctrines of res judicata and collateral estoppel. Id. The District Court has done exactly this. By erroneously dismissing or not allowing to be joined all of Petitioner's legal claims, it has managed to deprive him of a jury trial on all issues he would have been entitled to a jury trial on.

The instant case is identical to Lytle in that the only reason the District Court was able to apply collateral estoppel or res judicata to Petitioner's legal claims was because it had erroneously prevented Petitioner from joining his legal and equitable claims in the first place. There is particular concern in the instant case because Petitioner did in fact initially join every single one of his legal and equitable claims prior to trial of his equitable claims in *Dailey I*.

There has been a gross injustice forced upon Petitioner by this deprivation of his right to a jury trial on all issues common to his equitable and legal claims. There can be no greater violation by a court then the deprivation of a litigant's constitutional rights. Despite the fact that Petitioner has done everything which was required of him, including, meeting the improper administrative prerequisites required by the District

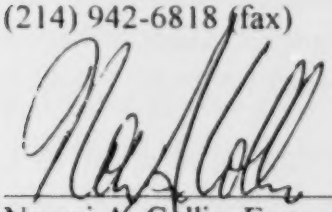
Court, he has been denied his right to a jury trial on every one of his legal claims, including the ADA claim dismissed without prejudice and currently before the Fifth Circuit Court of Appeals.

## CONCLUSION

For the reasons stated, Petitioner, Ollie Dailey, prays that this Court grant a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals to affirm the District Court's decisions as set out herein.

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| | * | **3:91-CV-1327-X** |
| **LTV AEROSPACE AND** | * | |
| **DEFENSE COMPANY,** | * | |
| | * | |
| **Defendant.** | * | |

**ORDER**

NOW before the Court ar Plaintiff's Motion to File Plaintiff's Final Supplemental Complaint, filed on June 17, 1993, and the Motion in Support of Defendant LTV Aerospace and Defense Company to Strike Plaintiff's Final Supplemental Complaint and for Attorney's Fees, filed on June 17, 1993. Plaintiff filed his final supplemental complaint without leave of Court on May 28, 1993. Having considered these filed materials and the applicable law, the Court determines that Plaintiff's motion must be **DENIED** but that Defendant's motion to strike must be **GRANTED.**

The facts underlying Plaintiff's final supplemental complaint are remote in time and substance from those informing his complaint and have never been submitted to the EEOC for investigation, which is a prerequisite for his filing suit. Plaintiff's final supplemental complaint, filed on May 28, 1993, is therefore hereby **STRUCK**. Defendant's motion for attorney fees is hereby **DENIED**.

**SO ORDERED.**

November 4th, 1993.

/s Joe Kendall
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| | * | **3:91-CV-1327-X** |
| **LTV AEROSPACE AND** | * | |
| **DEFENSE COMPANY,** | * | |
| | * | |
| **Defendant.** | * | |

**MEMORANDUM OPINION & ORDER**

NOW before the Court are the Motion of Defendant LTV Aerospace and Defense Company for Summary Judgment, filed on July 30, 1993, the response to that motion and the reply to that response. Having considered these filed materials, the summary judgment evidence and the applicable law, the Court determines that Defendant's motion should be, and hereby is, **GRANTED** in part and **DENIED** in part.

This is an employment discrimination case. Plaintiff, an African-American, formerly worked for Defendant as a class B machinist, having been hired in 1984. He was injured on the job in January, 1990, and his doctor placed him on various work restrictions concerning the amount of weight he could lift. These restrictions varied frequently, hitting virtually every five-pound increment between five and fifty pounds. Plaintiff's doctor stated on various occassions that Plaintiff would be unable to work at all. Plaintiff was also transferred back and forth from the first shift to the third shift several times. Defendant contends that these transfers were due to Plaintiff's therapy schedule or otherwise related to his work restrictions while Plaintiff claims that at least one transfer was motivated by racial animus.

Although his physician had recently opined that he would not be able to return to work, Plaintiff filed a complaint with the Office of Federal Contract Compliance Programs (OFCCP) alleging that he was not returned to work because of his handicap. Another incident involved a racist statement of which Plaintiff complained made by a white member of management, Gerald Skinner. After investigation, Defendant determined that Skinner should be suspended for three days for his statement that he believed whites and blacks should not mix. Plaintiff received a three-day suspension for exclaiming "tell those fucking white boys to leave my tool box alone," upon his arrival at work and finding his tool box moved. However, Plaintiff complains that he was suspended in retaliation for complaining about Skinner's statement and that his suspension was racially motivated. Plaintiff also alleges that Defendant denied him training on certain machines because of his race.

Plaintiff alleges several causes of action. He asserts claims for intentional infliction of emotional distress, for a violation of Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 793, for a violation of the Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12101-12213, and for violations of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, *et seq.*

The movant in a summary judgment context must show the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Slaughter v. Southern Talc Co.*, 949 F.2d 17, 170 (5th Cir. 1991). The existence of a genuine issue of material fact is determined based on whether a fair minded jury could return a verdict for the plaintiff based on the evidence presented. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986). The rules allocating the burden of proof guide a court in a summary judgment analysis, *Fields v. City of S. Houston*, 922 F.2d 1183, 1187 (5th Cir. 1991), and such allocation depends on the burden of proof that would obtain at trial. *See*

*Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 150 (5th Cir. 1991). The nonmovant is not required to respond to the motion until the movant properly supports his motin with competent evidence. *Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1675 (1992). However, once the movant has carried his burden of proof, the nonmovant may not sit idly by and wait for trial. *Page v. DeLaune*, 837 F.2d 233, 239 (5th Cir. 1988). When a movant carries his initial burden, the burden shifts to the nonmovant to show that the entry of summary judgment is inappropriate. *Duckett v. City of Cedar park*, 950 F.2d 272, 276 (5th Cir. 1992). Although the nonmovant may satisfy this burden by tendering depositions, affidavits and other competent evidence,[1] "[m]ere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 113 SCt. 82 (1992). Although a court must "review the facts drawing all inferences most favorable to the party opposing the motion," *Rosado v. Deters*, ___ F.3d ___, No. 92-4109, 1993 WL 3939601, at *2 (5th Cir. Oct. 22, 1993)(quoting *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986)), the nonmovant may not rest on mere allegations or denials in its pleadings; instead, "the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). However, merely colorable evidence or evidence not significantly probative will not defeat a properly supported summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). The existence of a mere scintilla of evidence will not suffice. *Id.* at 252. When the nonmoving party fails to make the requisite showing and the moving party has met his summary judgment burden, the movant is entitled to summary

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1 See FED. R. CIV. P. 56(e).

judgment. FED. R. CIV. P. 56(c); *Campbell v. Sonat Offshore Drilling*, 979 F.2d 1115, 1119 (5th Cir. 1992).

This year, the Supreme Court of Texas placed its imprimatur on the intentional infliction cause of action, which had been recognized for some time by courts of appeals. In *Twyman v. Twyman*, 855 s.W.2d 619 (Tex.1993), the court stated the following regarding that cause of action:

> While this court has never expressly recognized the tort of intentional infliction of emotional distress, we found no reversible error in the court of appeals' opinion in *Tidelands Automobile Club v. Walters*, which did so. 699 S.W.2d 939 (Tex. App. -- Beaumont 1985, writ ref'd n.r.e.). There, the court of appeals adopted the elements of the tort as expressed in the RESTATEMENT (SECOND) OF TORTS Sec. 46 (1965). The Restatement elements of intentional infliction of emotional distress are: 1) the defendant acted intentionally or recklessly, 2) the conduct was extreme and outrageous, 3) the actions of the defendant caused the plaintiff emotional distress, and 4) the emotional distress suffered by the plaintiff was severe. Id. According to the Restatement, liability for outrageous conduct should be found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. cmt. d.

Having scrutinized the summary judgment record, the Court concludes that Plaintiff adduces no evidence that Defendant's conduct was extreme or outrageous. Although "Plaintiff contends he can prove a course of conduct intended to harass and harm Plaintiff beginning from the day he was set up and caused to lose his temper at work on the 16th day of October, 1990, [the "fucking white boys" comment] until he was finally laid off on July 31, 1993," he offers no evidence of

such conduct. In the summary judgment context, it is axiomatic that where, as here, the nonmoving party would bear the burden of proof at trial, that party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting FED. R. CIV. P. 56(e)). Plaintiff simply fails that burden.

Plaintiff next asserts a claim under Section 503 of the Rehabilitation Act. That Section provides as follows:

> If any individual with a disability believes any contractor has failed or refused to comply with the provisions of a contract with the United States, relating to employment of individuals with disabilities, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

29 U.S.C. Sec. 793(b). Defendant asserts that no private right of action exists under this provision. *See generally* Marc I. Steinberg & William A. Reece, *The Supreme Court, Implied Rights of Action, and Proxy Regulation*, 54 OHIO ST. L. J. 67 (1993)(regarding the contours of private rights of action). The United States Court of Appeals for the Fifth Circuit agrees with Defendant. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1085 (5th Cir. 1980), *cert. denied*, 449 U.S. 889 (1980)(holding that no private right exists under Section 503). After forcing Defendant to answer this allegation and necessitating a portion of a summary judgment motion to assail it, Plaintiff simply gives up, stating, "Plaintiff will concede he has no individual claim under this statute." The Court wonders why Plaintiff's reasonable inquiry under Rule 11, FED. R. CIV. P., did not reveal the absence of a private right under Section 503

before Plaintiff composed his complaint to include that count and forced Defendant through the time, effort and expense to fight it. In any event, Defendant demonstrates its entitlement to summary judgment on Plaintiff's Rehabilitation Act claim.

Plaintiff's ADA claim stands in an interesting posture. Before passage of the ADA, aggrieved disabled persons had a remedy only though the Department of Labor via the Rehabilitation Act. After passage of the ADA, an additional avenue for recourse opened via private rights of action established by the ADA. Congress realizes, though, that the same conduct might be actionable under both acts, and provided for reduction of duplication of effort by adding the following to the Rehabiliation Act:

> The Secretary shall develop procedures to ensure that administrative complaints filed under this section [Section 503] and under the Americans with Disabilities Act of 1990 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this section and the Americans with Disabilities Act of 1990.

29 U.S.C. Sec. 793(e). The ADA contains a similar provision. *See* 42 U.S.C. Sec. 12117(b) One of the regulations promulgated to avoid duplication states as follows:

> If an individual who has already filed a section 503 complaint with OFCCP subsequently attempts to file or files an ADA charge with EEOC covering the same facts and issues, EEOC will decline to accept the charge (or, alternatively, dimiss the charge that has been filed) on the grounds that such charge has already been filed under the ADA, simultaneous with the filing of the earlier section 503 complaint, and will be processed by OFCCP in accordance with the provisions of this section.

29 C.F.R. Sec. 1641.5(g). Title 41, concerning public contracts and property management, contains the same provision. *See* 41 C.F.R. Sec. 60-742.5(g).

Plaintiff filed a complaint with the OFCCP on November 12, 1992, alleging disability dicrimination, a charge arising under both Section 503 and the ADA. On November 20, 1992, he filed a separate ADA charge with the EEOC, challenging the same action as in the OFCCP complaint. Plaintiff apparently did not inform the EEOC that he had already filed the OFCCP complaint, and the EEOC therefore did not decline to accept the charge or dismiss it, but instead issued a right to sue letter. Plaintiff concedes that if the OFCCP complaint is settled, his ADA claim will be moot as a result. He contends that the flaw in Defendant's reasoning is Defendant's contention that the OFCCP complaint may be settled.

It appears that Plaintiff has managed to create just the sort of confusion and duplication of effort that Congress attempted so copiously to prevent by delegating authority to the administering agencies to harmonize potential duplication between the Rehabilitation Act and the ADA. Because the EEOC, had it known of Plaintiff's earlier OFCCP complaint, would have declined Plaintiff's ADA complaint, it would not have issued a right to sue notice. Rather than add to the confusion that Plaintiff has created, the Court determines that the better course of action would be to allow the administrative process to operate the way Congress intended, and dismiss Plaintiff's ADA claim. As both parties agree, if the OFCCP process is successful, the ADA claim is moot, if not, it will be referred to the EEOC for conciliation, and Plaintiff may then pursue it as he likes.

Finally, the Court turns to Plaintiff's Title VII claim. The legal standards applicable to discrimination cases contain a dance among shifting burdens of production. First, a plaintiff must establish a *prima facie* case, which gives rise to an inference of discrimination. Generally, a

plaintiff does so by proving that he was (1) discharged, (2) qualified for the position, (3) within a protected group at the time of the discharge and (4) replaced by someone outside of the protected group or otherwise discharged because of his membership in the protected group. *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir. 1993), *petition for cert. filed*, 60 U.S.L.W. (U.S. Aug. 23, 1993)(No. 93-278). These are the so-called "McDonnell Douglas" factors, after *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and they may be modified as necessary to conform to the facts of a particular case. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 (1976). Accordingly, courts have applied the factors to a variety of employment-related scenarios. *See, e.g., Barnes v. Exxon Corp.*, 57 Fair Empl. Prac. Cas. (BNA) 1384 (S.D. Tex. 1991)(transfer); *Redd v. Phenix City*, 934 F.2d 1211 (11th Cir. 1991)(promotion); *Budd v. City Univ. of New York*, 749 F.Supp. 86 (S.D.N.Y. 1990)(compensation).

By establishing a *prima facie* case, the plaintiff creates a rebuttable presumption that the employer unlawfully discriminated against him. *Saint Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993). Next, the burden falls on the defendant to rebut the presumption by producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason. *Id.* As the Supreme Court has emphasized, although the burden of production shifts to the defendant, the burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Id.* The defendant's successfully carrying the burden of production rebuts the *prima facie* case, which at that point drops from the case.[2] *Id.* The plaintiff then has

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[2] It is important to note that whether a defendant carries his burden of production involves no credibility assessment, "[f]or the burden of production determination necessarily *precedes* the credibility-

the opportunity to put on evidence that the defendant's proffered reason was not the true one for the employment decision, but in order to show pretext, the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason. *Id.* at 2752 (emphasis in original).

Plaintiff asserts several different instances of alleged discriminatory conduct. Specifically, he claims that Defendant failed to train him on new machines, moved him to a different shift, and failed to return him to work, all because of his race. He also alleges that his discipline for the "fucking white boys" statement was meted out discriminatorily. Having reviewed the record in light of the standards set forth above and ni the summary judgment context, the Court concludes that genuine issues of material fact exist precluding the entry of summary judgment on Plaintiff's Title VII claims. Defendant's motion must therefore be denied on that count.

For the foregoing reasons, the Court determines that Defendant has demonstrated its entitlement to summary judgment on Plaintiff's intentional infliction and Section 503 Rehabilitation Act claim. Plaintiff's ADA cause of action is dismissed, and Defendant's motion is denied regarding Plaintiff's Title VII claims.

**SO ORDERED.**

November 9th, 1993

/s Joe Kendall
United States District Judge

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assessment stage." *Saint Mary's Honor Center*, 113 S.Ct. at 2748 (emphasis in original). In other words, the Court is to take the defendant's rebuttal evidence as true. *Id.*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| | * | **3:91-CV-1327-X** |
| **LTV AEROSPACE AND** | * | |
| **DEFENSE COMPANY,** | * | |
| | * | |
| **Defendant.** | * | |

**MEMORANDUM OPINION AND ORDER**

NOW before the Court is Plaintiff's Second Motion for Leave to File Plaintiff's Final Supplemental Complaint, filed on December 6, 1993. The Court determines that Plaintiff's motion should be, and hereby is, **DENIED.**

As Plaintiff notes, he filed his final supplemental complaint without leave of court on May 28, 1993. This complaint, and the proposed one concerned in the current motion, sought to add a new issue regarding whether his layoff at LTV, which apparently became effective on July 31, 1993, was an additional act of discrimination or retaliation. Plaintiff filed a motion for leave to file the already-filed supplemental complaint on June 17, 1993. This Court, in considering that motion, determined that the facts underlying it were remote in time and substance from those underlying Plaintiff's current allegations and concluded that it was necessary for the new issue to be submitted to the EEOC; the Court therefore denied Plaintiff's motion. About November 26, 1993, Plaintiff received his right to sue letter from the EEOC on Plaintiff's layoff claim.

This case is set for trial in January, 1994--next month--and is scheduled for a pretrial conference in but a few days, on the 17th of December, 1993. The time for discovery has long since run, and virtually all other deadlines in the Court's scheduling order have likewise run. Simply put, this case is virtually trial ready. To allow Plaintiff to interject yet another issue into the case at this late date would undermine the current trial setting and cause the entire case to be opened anew. In essence, it would necessitate a new, full scheduling order and a new trial setting; indeed, it would be like filing a new case. Because of the inevitable outcome, the Court determines that if Plaintiff's additional allegations are to be adjudicated, they must be the subject of another proceeding; they have come simply too late to be dealt with here.

**SO ORDERED.**

December 14th, 1993.

/s Joe Kendall
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| | * | **3:91-CV-1327-X** |
| **LTV AEROSPACE AND** | * | |
| **DEFENSE COMPANY,** | * | |
| | * | |
| **Defendant.** | * | |

## MEMORANDUM OPINION AND ORDER

NOW before the Court are the Motion of Defendant LTV Aerospace and Defense Company to Remove Case from Jury Docket, filed on November 12, 1993, and the response to that motion. Having considered these filed materials and the applicable law, the Court determines that Defendant's motion should be, and hereby is, **GRANTED.**

This is a Title VII race discrimination case. The facts supporting Plaintiff's EEOC charge for racial discrimination, which in turn supports his lawsuit, all occurred before the applicable date for the Civil Rights Act of 1991, although Plaintiff pleads some facts arising after the '91 Act's effective date. There latter facts, though, are the subject of another EEOC complaint not at issue here. In the instant motion, Defendant argues that Plaintiff is not entitled to a jury because no EEOC charge supports his post '91 Act facts. Plaintiff argues that those facts were part of a continuing violation and should therefore relate back to his EEOC charge.

The continuing violation doctrine becomes important in relation to conduct occurring outside of a limitation period. The Fifth Circuit has explained this situation thus:

> For a narrow range of cases, those in which a violation is continuing in nature, this court recognizes that liability may be based on continuing unlawful conduct which proceeds the liability period. When an employer has a discriminatory promotion policy or system and the *system* is maintained into the charge-filing period, a plaintiff may attack the promotion system even though the plaintiff was not denied a job benefit within the charge-filing period.

*Rendon v. A T & T Technologies*, 883 F.2d 388, 395-96 (5th Cir. 1989)(citations omitted)(emphasis in original). This doctrine, though perhaps facially connected to Plaintiff's situation, fails to apply on further interrogation. The facts giving rise to Plaintiff's *race* discrimination claims supported by an EEOC charge all occurred before the '91 Act's effective date. The conduct occurring in October of 1992 gave rise to a separate EEOC complaint that Plaintiff filed, but it dealt now with race discrimination, but rather with disability discrimination under the ADA. Now Plaintiff seeks to assert that race was a motivating factor in October of 1992 although he did not make that allegation before the EEOC. He argues that the earlier filed EEOC charge should also encompass the later occurring conduct.

This will not do. As Defendant demonstrates, if race discrimination occurred in October of 1992, Plaintiff had 300 days to file a charge with the EEOC. *Hornsby v. Conoco, Inc.*, 777 F.2d 243 (5thCir. 1985). Over a year has passed since the alleged October race discrimination. If Plaintiff believed that race motivated some adverse employment action against him in October of 1992, he should have timely amended his charge. Plaintiff simply cannot wedge a new claim into this suit in derogation of procedures that Congress established for the disposition of such claims.

For the foregoing reasons, Defendant's motion must be granted. Although Plaintiff, by October of 1992, was well versed in filing both grievances and EEOC charges based on

race discrimination, he elected to base his charge arising from incidents in October of 1992 on disability discrimination. For him to allege race discrimination now is incongruous, except for the ulterior motive of trying to bootstrap his way into a jury to which he is not otherwise entitled.

**SO ORDERED.**

December 17th, 1993.

/s Joe Kendall
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| | * | **3:91-CV-1327-X** |
| **LTV AEROSPACE AND** | * | |
| **DEFENSE COMPANY,** | * | |
| | * | |
| **Defendant.** | * | |

## MEMORANDUM OPINION & ORDER

NOW before the Court are Plaintiff's Motion for Reconsideration of November 9, 1993, Memorandum Opinion, filed on November 16, 1993 and the response to that motion. Having considered these filed materials and the applicable law, the Court determines that Plaintiff's motion should be, and hereby is, **DENIED.**

Plaintiff seeks reconsideration of two points in the Court's November 9, 1993 memorandum opinion and order. First he complains regarding the disposition of his intentional infliction of emotional distress claim and second, of the fate of his ADA claim.

Regarding the intentional infliction claim, Plaintiff claims that Defendant deliberately "set him up" to lose his temper and utter a racial slur, thereby enabling Defendant to pounce on him, punishing him for the comment. In Plaintiff's view, the punishment wa not legitimate but was instead retaliation for another incident. Specifically, a white manager stated that he believed whites and blacks should not mix. Plaintiff reported this statement, and the white manager received a suspension for it. Later, Plaintiff came to work and found his tool box relocated to a place Plaintiff was unaccustomed

to its being. Upon finding his moved tool box, Plaintiff stated something like "tell those fucking white boys to leave my tool box alone." Plaintiff was punished with a suspension for his comment.

Plaintiff's motion paints him as a champion of his co-workers' rights, fighting and filing grievances for those rights whle employed by Defendant. He sees Defendant's refusal to return him to work arising not as a result of his lifting restrictions--Defendant claims that it had no work for which he was qualified that would accommodate a lifting restriction--but rather in retaliation for his fighting for co-workers', and his own, "rights."

The Court has absolutely no quarrel with Plaintiff's being a champion of co-workers' rights. The rub lies instead with the amount and quality of evidence that Plaintiff adduced in relation to his intentional infliction claim to rebut Defendant's summary judgment motion. He claims that the "cumulative effect" of Defendant's refusing to return him to work, his suspension for the fucking-white-boys comment, and other "specific instances of discrimination and retaliation," which remain unnamed and, more importantly in this context, unsupported by any evidence, amounts to outrageous conduct sufficient to raise a genuine issue of material fact precluding the entry of summary judgment on his intentional infliction claim.

Conduct supporting an intentional infliction claim must be "utterly intolerable in a civilized community," and "exceed all possible bounds of decency." *Wornick Co. v. Casas*, 856 S.W.2d 732, 735 (Tex. 1993). The Supreme Court of Texas has also stated that "'[i]t is for the court to determine, in the first instance, whether the defendant's condut may reasonably be regarded as so extreme and outrageous as to permit discovery. . . '" *Id.* at 734 (quoting RESTATEMENT (SECOND) OF TORTS Sec. 46 cmt. h.). The best Plaintiff can do to support his allegation of outrageous conduct is to recite the facts surrounding the

fucking-white-boys incident. that and the "cumulative effect" of Defendant's refusal to return him to work constitute the totality of Plaintiff's evidence. An ancillary problem with Plaintiff's argument is that he has no evidence connecting Defendant with the relocating of his tool box. In any event, as a matter of law, what Plaintiff does allege does not raise a genuine issue of material fact on the issue of outrageous conduct. This is not a pleading problem--this is not the 12(b)(6) arena--this is an evidentiary problem; plaintiff simply does not carry his burden.

Plaintiff next takes issue with the Court's dismissal of his ADA claim. It is important to note that the Court dismissed the ADA claim without prejudice because it was still in the administrative process and therefore subject to disposition there. Although the Department of Labor may have deferred its efforts so that the issue could be considered in this suit, the EEOC has apparently decided to undertake conciliaton of Plaintiff's ADA claim. (*See* Aff. Maureen F. Moore at paras. 2-4). Plaintiff has repeatedly complained that that claim will not settle in the administrative process--so much for good faith efforts at settlement as required by Local Rule 9.1(a) and required good faith participation in the administrative process, *see Munoz v. Aldridge*, 894 F.2d 1489, 1492 (5th Cir. 1990)-- but in any event, his fear is unfounded. As Defendant points out, if an employer does not agree to provide the relief determined to be full relief by the EEOC, it is subject to suit either by the EEOC or by the charging party. *See* 42 U.S.C. Sec. 2000e-5(f). If, though, the employee refuses to accept the relief deemed to be full relief by the EEOC, the employee has no further claim against the employer and a subsequent court action will be dismissed. *See Wrenv. Secretary, Dept. of Veterans Affairs*, 918 F.2d 1073, 1077-79 (2nd Cir. 1990), *cert. denied*, 499 U.S. 977 (1991).

In addition to Plaintiff's ADA claim being premature here because it is still involved in the administrative process,

it is far too late to inject what is essentially a new claim into a suit that was filed in 1991 and that is set for trial in less than a month.

For the foregoing reasons, Plaintiff's motion to reconsider is denied.

**SO ORDERED.**

December 17th, 1993.

/s Joe Kendall
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| | * | **3:91-CV-1327-X** |
| **LTV AEROSPACE AND** | * | |
| **DEFENSE COMPANY,** | * | |
| | * | |
| **Defendant.** | * | |

**FINAL JUDGMENT**

By separate Findings of Fact and Conclusions of Law filed today, the Court has found in favor of this Defendant on all Plaintiff's causes of action. Plaintiff's suit is hereby **DISMISSED** in its entirety, with prejudice. Defendant is awareded all costs incurred herein.

**SO ORDERED**, this 6th day of January, 1995.

/s Joe Kendall
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| | * | **3:94-CV-325-X** |
| **VOUGHT AIRCRAFT** | * | |
| **COMPANY,** | * | |
| | * | |
| **Defendant.** | * | |

**ORDER**

Plaintiff, Ollie Dailey, has three suits pending before this Court al of which involve substantially the same claims and allegations. In all of these actions, Dailey alleges that he has been the victim of employment discrimination of one type or another at the hands of the Defendant, its employees, his supervisors and his co-workers. Cause number 91-1327, "*Dailey I*", was litigated in a five-day bench trial and had been taken under advisement by this Court and by separate order with findings of fact and conclusions of law is ruled upon and disposed of this date. Cause number 94-325, "*Dailey II*", was transferred to this Court after it was assigned to Judge A. Joe Fish. Cause number 94-1214, "*Dailey III*", was transferred to this Court after it was assigned to Judge Barefoot Sanders.

*Dailey II* alleges that Dailey was laid off on account of his race and in retaliation for previously alleging Title VII violations. There is no factual or evidentiary support for Dailey's claim that he was laid off either in retaliation for having filed previous discrimination claims, or that he was laid off on account of his race, which is different from evidence submitted in *Dailey I*.

Upon review of the complaint in *Dailey II* and the amended complaint in *Dailey I*, the Court is of the considered opinion that the Plaintiff and his counsel have filed *Dailey II* in an attempt to relitigate the matters which were tried and fully litigated and have been under advisement and consideration by this Court. But for the tranfer policies of this Court, considerable judicial effort and resources would have been expended by Judges Fish and Sanders in dealing with these vexatious, duplicative lawsuits. Such an expenditure *was made* by Judge Kendall and Counsel for the Defendants in dealing with these cases. If this Court were to allow Plaintiff and his counsel to succeed in their attempt to obtain a second bite at the apple simply by inviting themselves to someone else's picnic, it would be allowing them to make a joke out of the legal process. By separate order of this date, the Defendant's motion for sanctions has been granted for this conduct.

Therefore, after consideration of the documents in both cases, the Court is of the opinion that the instant action should be, and hereby is, **DISMISSED** with **PREJUDICE**. The Clerk of the Court is **ORDERED** to close this case and to provide all parties with notice of its dismissal.

**SO ORDERED.**

Dated: January 6th, 1995.

/s Joe Kendall
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| | * | **3:94-CV-1214-X** |
| **VOUGHT AIRCRAFT** | * | |
| **COMPANY,** | * | |
| | * | |
| **Defendant.** | * | |

## MEMORANDUM OPINION AND ORDER

Plaintiff, Ollie Dailey, has three suits pending before this Court all of which involve substantially the same claims and allegations. In all of these actions, Dailey alleges that he has been the victim of employment discrimination of one type or another at the hands of the Defendant, its employees, his supervisors and his coworkers. Cause number 91-1327, "*Dailey I*", was litigated in a five-day bench trial and had been taken under advisement by this Court and by separate order with findings of fact and conclusions of law is ruled upon and disposed of this date. Cause number 94-325, "*Dailey II*", was transferred to this Court after it was assigned to Judge A. Joe Fish. Cause number 94-1214, "*Dailey III*", was transferred to this Court after it was assigned to Judge Barefoot Sanders.

*Dailey III* alleges that Dailey was not permitted to return to work in October of 1992 in violation of the ADA, Title VII and 42 U.S.C. Sec. 1981. The Court finds that with the exception of the ADA action, the causes of action alleged are duplicative of claims which were asserted or should have been asserted in *Dailey I*.

The Title VII claim was ruled by this Court in its opinion in *Dailey I* issued on December 17, 1993 dismissing that claim for failure to file a new charge of discrimination within 300 days from the October 1992 events about which Dailey complains, and is barred by the doctrine of collateral estoppel. "Collateral estoppel precludes relitigation of issues actually litigated and determined in [a] previous suit." *Montana v. United States*, 99 S.Ct. 970, 973 (1979). The issues involved in the Title VII claim were clearly "actually litigated and determined" by a previous order.

Dailey's claim arising under 42 U.S.C. Sec. 1981 is barred by the doctrine of res judicata as it should have been asserted in *Dailey I*. True "res judicata," or claim preclusion, requires, "among other things, an identity of cause of action or claims . . . [A] single cause of action or claim cannot be 'split' by advancing one part in an initial suit and attempting to reserve another for a later suit." *Texas Employer's Ins. Ass'n v. Jackson*, 862 F.2d 491, 501 (5th Cir. 1988). Ms. Collie and the Plaintiff have attempted to split Dailey's single cause of action of employment discrimination by withholding the Sec. 1981 claim like a card up their sleeves. The Fifth Circuit has generally applied a broad definition of "claim" or "cause of action" in determining whether or not a prior court judgment bars a later suit. *See Texas Employer's Ins. Ass'n v. Jackson*, 862 F.2d 491, 501 (5th Cir. 1988). Even a narrowly tailored definition would prevent the thinly-veiled attempts of Lawyer Collie and Mr. Dailey.

Upon review of the complaint in this action and the amended complaint of *Dailey I*, the Court is of the considered opinion that the Plaintiff and his counsel have filed *Dailey III* in an attempt to relitigate the matters which were tried and fully litigated and have been under advisement and consideration by this Court. But for the transfer policies of this Court, considerable judicial effort and resources would have been expended by Judges Fish

and Sanders in dealing with these vexatious, duplicative lawsuits. Such an expenditure *was made* by Judge Kendall and Counsel for Defendants in dealing with these cases. If this Court wer to allow Plaintiff and his counsel to succeed in their attempt to obtain a second bite at the apple simply by inviting themselves to someone else's picnic, it would be allowing them to make a joke out of the legal process. By separate order of this date, the Defendant's motion for sanctions has been granted for this conduct.

Therefore, after consideration of the documents in both cases, the Court is of the opinion that the Title VII claim and the claim under 42 U.S.C. Sec. 1981 in the instant action shoud be, and hereby are **DISMISSED** with **PREJUDICE.**

**SO ORDERED.**

Dated: January 6, 1995.

/s Joe Kendall
United State District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| | * | **3:94-CV-325-X** |
| **VOUGHT AIRCRAFT** | * | |
| **COMPANY,** | * | |
| | * | |
| **Defendant.** | * | |

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| | | |
|---|---|---|
| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| | * | **3:94-CV-1214-X** |
| **VOUGHT AIRCRAFT** | * | |
| **COMPANY,** | * | |
| | * | |
| **Defendant.** | * | |

**ORDER ON MOTION OF DEFENDANT VOUGHT AIRCRAFT COMPANY FOR RULE 11 SANCTIONS**

Now before the Court is Defendant's Motion for Rule 11 Sanctions. After considering the written positions of the parties, the Court is of the opinion that the position of Vought Aircraft Company is well taken and that the motion should be, and hereby is, **GRANTED**. In support of this Order, the Court makes the following findings:

Plaintiff Ollie Dailey ("Dailey") has filed three separate actions against Vought Aircraft Company ("Vought"), all of which are pending before this Court. 3:91-CV-1327-X

("*Dailey I*"), was tried before the Court in January of 1994, concerned race discrimination and retaliation in violation of Title VII and has been under advisement and consideration. The Court in a separate order disposed of that case today. The second action, 3:94-CV-325-X ("*Dailey II*") alleges Dailey was laid off on account of his race and in retaliation for previously alleging Title VII violations. This is the same claim litigated in *Dailey I*. The third action, 3:94-CV-1214-X ("*DaileyIII*") alleges that Dailey was not permitted to return to work in October of 1992 in violation of the ADA, Title VII and 42 U.S.C. Sec. 1981. Unhappy with the Court's speed in ruling[3], and obviously unfamiliar with the transfer rules of this Court as applied to similar cases involving the same litigants,[4] Counsel and the Plaintiff simply filed the same lawsuit again. The Court finds that with the exception of the ADA claim, Dailey and his counsel violated Rule 11 in bringing these suits, alleging Title VII and Sec. 1981 were violated when he was not returned to work in October of 1992, matters which were specifically and thoroughly litigated before this Court in January 1994, in *Dailey I* (3:91-CV-1327-X).

There is no factual or evidentiary support for Dailey's claim that he was laid off either in retaliation for having filed previous discrimination claims, or that he was laid off on account of his race, which is different from any evidence submitted in those claims in *Dailey I*. Neither Dailey nor his

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3 By correspondence to the Court and by repeated telephone calls to the Court, both Counsel and Mr. Dailey expressed their anger with the Court's delay in ruling and threatened in writing to mandamus the Court if the Court did not "rule quickly."

4 *Dailey II* and *Dailey III* were originally assigned by random draw to Judges A. Joe Fish and Barefoot Sanders, respectively, and were transferred to Judge Kendall after the existence of *Dailey I* was determined.

counsel conducted a reasonable inquiry into the facts at any time prior to the filing of these actions, and in fact knew the facts were otherwise. Dailey and his counsel may not sing one tume in front of this Court and then later attempt to sing the same song to other judges hoping at least one will march to the beat. Dailey and his counsel have therefore violated Rule 11 (b), (b)(1) and (b)(3).

The Title VII claim found in *Dailey III* was ruled on by this Court in its opinion of December 17, 1993 dismissing that claim. Therefore that claim is barred by the doctrine of collateral estoppel, a fact known to counsel for the Plaintiff. Dailey's claim arising under 42 U.S.C. Sec. 1981 is barred by the doctrine of res judicata. Ms. Collie has taken the time-worn approach of flinging things against the wall to see what sticks to a new high. There is no basis for arguing that these claims are warranted under existing law or that there is any basis for arguing for an extension, modification or reversal of existing law. Neither is there a cogent argument for the establishment of new law. Dailey and his counsel have therefore violated Rule 11(b)(1) and Rule 11(b)(2).

The Court concludes that the new suits were filed hoping either to circumvent the perceived outcome of the case we tried in the January 1994 bench trial or they were filed to harass the defendants in the hopes of extorting a nuisance value settlement. Regardless, the Court must deter repetition of such conduct by these litigants or comparable conduct by others similarly situated therefore, appropriate sanctions are necessary. The Court finds that Dailey and his counsel should be held jointly and severally liable for the costs and attonerys' fees Vought has incurred in defending these actions. Accordingly, the Court.

**ORDERS**, that Vought provide the Court and opposing counsel a statement of costs and attorneys' fees incurred in defending action nos. 3:94-CV-325-X and 3:94-CV-1214-X, exclusive of the ADA claim, within ten days of entry of

this Order. Plaintiff and his counsel shall have ten days within which to dispute any of the charges and fees. Within twenty days after resolution by the Court of any disputes raised by the Plaintiff or his counsel, the Court

**FURTHER ORDERS**, that Plaintiff Ollie Dailey and his counsel, Noemi Collie shall pay to Vought Aircraft Company and True Rohde & Sewell the amount approved by this Court as reasonable costs and fees.

After careful consideration, the Court believes this to be the least severe sanction available to deter this conduct in the future and to make the aggrieved Defendant whole. Having no knowledge of previous sanctionable conduct by Ms. Collie or the Plaintiff, the Court is not imposing any punitive sanctions, at this time, for the waste of judicial resources that has occurred as a result of the offending conduct, but both are hereby warned that any similar future conduct will be dealt with more harshly.

**SO ORDERED.**

Dated: January 6th, 1995.

/s Joe Kendall
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| | * | **3:94-CV-1214-X** |
| **VOUGHT AIRCRAFT** | * | |
| **COMPANY,** | * | |
| | * | |
| **Defendant.** | * | |

**JUDGMENT**

In accordance with the Court's separate order granting the motion to sever dismissed claims dated April 12, 1995, it is **ORDERED, ADJUDGED AND DECREED** that judgment be entered for the defendant and that Plaintiff's claim that he was denied the right to return to work in October of 1992 in violation of Title VII and 42 U.S.C. Sec. 1981 be **DISMISSED WITH PREJUDICE**.

It is further **ORDERED, ADJUDGED AND DECREED** that judgment be entered for the defendant and that Plaintiff's claims that he was laid off on account of his race and in retaliation for his having previously brought Title VII claims also be **DISMISSED WITH PREJUDICE**.

It is further **ORDERED, ADJUDGED AND DECREED** that costs of court attributable to these claims be assessed against the Plaintiff.

All other claims present in cause number 3:94-CV-1214-X survive this judgment.

**SO ORDERED.**

Dated: April 12th, 1995.

/s Joe Kendall
United States District Judge

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**Nos. 95-10156 and**
**95-10437**
**Summary Calendar**

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**OLLIE DAILEY,**

**Plaintiff-Appellant,**

**VS.**

**LTV AEROSPACE AND DEFENSE COMPANY,**

**Defendant-Appellee.**

**********

**OLLIE DAILEY,**

**Plaintiff-Appellant,**

**VS.**

**VOUGHT AIRCRAFT COMPANY,**

**Defendant-Appellee.**

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**Appeals from the United States District Court for the**
**Northern District of Texas**
**(3:91-CV-1327-X & 3:94-CV-325)**

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Before JOLLY, JONES, and STEWART, Circuit Judges.

PER CURIAM:*

Through piecemeal filings with the Equal Employment Opportunity Commission ("EEOC") over a period of several years on some charges, and failure to file with the appropriate administrative agency on others, appellant Ollie Dailey created a legal and procedural morass for the trial court. We find that the district court maneuvered through that morass with precision, and therefore affirm in all respects the judgments and rulings of the district court that are the subject of this appeal.

I.

Since 1990, Dailey has brought three suits against Vought and its predecessor, LTV, for violations of employment-related statutes.

A.

The first, Dailey v. LTV Aerospace & Defense Co., No. 95-10156 ("Dailey I"), alleged Vought discriminated aginst Dailey on account of his race and disability, retaliated against him because he complained of discrimination, and intentionally inflicted emotional distress upon him. Dailey also sought to recover damages pursuant to the Civil Rights Act of 1991 (the '91 Act). In Dailey I, the district court:

> -dismissed Dailey's claims arising under the '91 Act, holding that the discriminatory conduct at issue occurred before passage of the '91 Act (September 7, 1991);
>
> -struck Dailey's final supplemental complaint, filed without leave of court, on the basis that the discrimination claims relating to Dailey's July 1993 layoff (the reason for the supplemental complaint)

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

were too remote in time to the October 1990 actions alleged in the original complaint, and that no EEOC charge had been filed on those claims (November 4, 1993);

-dismissed Dailey's second attempt to file the same supplemental complaint a few days before the pretrial conference (December 14, 1993);

-entered summary judgment in favor of Vought on Dailey's claims for intentional infliction of emotional distress and violation of the Rehabilitation Act (November 9, 1993);

-dismissed Dailey's claims under the ADA, without prejudice, to allow completion of the administrative process (November 9, 1993); denied motion for reconsideration of that dismissal (December 17, 1993);

-removed Dailey's case from the jury docket because Dailey's remaining claims arose before the effective date of the '91 Act, and Dailey had not made a timely attempt to amend his previous charge of race discrimination to include his October 1992 attempt to return to work (December 17, 1993);

-after trial on the merits of Dailey's claims, made findings of fact and conclusions of law dismissed Dailey's remaining claims and entering final judgment for Vought (January 6, 1995).[6]

B.

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6 This Court has jurisdiction to hear Dailey's appeal from this final judgment pursuant to 28 U.S.C. Sec. 1291.

In his second lawsuit, filed on February 18, 1994 ("Dailey II"), Dailey alleged Vought laid him off as a result of race discrimination and retaliation in violation of Title VII. Two months after he filed the second suit, Dailey attempted to amend his complaint to include claims that Vought violated the ADA, Title VII, and 42 U.S.C. Sec. 1981, when it failed to return him to work in October of 1992. Before the district court could rule on this motion to amend, Dailey withdrew it and filed a third action ("Dailey III") asserting his ADA, Title VII and Sec. 1981 claims. Dailey II and Dailey III were subsequently consolidated, and transferred to the same judge who had heard Dailey I.

In January 1995, the district court ruled as follows in the consolidated action (Dailey II and III)[7]: 1) Dailey presented no more evidence of discrimination than he had presented during Dailey I in support of his layoff claims, and his evidence was therefore insufficient to demonstrate discrimination; 2) Daiey and his counsel failed to conduct a reasonable inquiry into the facts before filing Dailey II challenging Dailey's layoff, and sanctions against both Dailey and his counsel were therefore appropriate; 3) Dailey's Title VII claim challenging the defendants' refusal to allow him to return to work in October of 1992 (asserted in Dailey III) had already been disposed of in Dailey I; 4) Dailey's Sec. 1981 claim challenging the defendants' refusal to allow him to return to work in October of 1992 asserted in Dailey III was barred as it could have been asserted in Daildy I; and 5) sanctions under Rule 11 were appropriate against both Dailey and his counsel for filing Daildy III.

In April 1995, the district court granted Dailey's motion to sever and entered final judgment in Dailey II and on the claims in Dailey III alleging Title VII and Sec. 1981

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7 These rulings are the subject of Appeal No. 95-10437, the second of Dailey's two consolidated appeals.

violations. Dailey's remaining ADA claim in Dailey III is currently pending before the district court.[8]

Dailey now appeals, challenging most of the rulings of the district court over the course of the litigation described above. Dailey argues that the district court: 1) should have allowed him to amend his complaint in Dailey I to incude additional Title VII claims, because he either did not need to exhaust his administrative remedies or, if he needed to exhaust his remedies, he had done so; 2) should not have dismissed (without prejudice) his ADA claims from Dailey I; 3) should not have removed Dailey I from the jury docket on the ground that there were no post '91 Act allegations properly before the court; 4) should not have denied Dailey the right to a jury trial in Dailey I; 5) should not have dismissed Dailey's Title VII and Sec. 1981 claims in Dailey II and Dailey III; and 6) should not have imposed sanctions for attempting to bring the claims in Dailey II and III that the district court held were without merit, or barred by res judicata.

We have reviewed the record, records excerpts, rulings of the district court, and briefs of the party. Although this litigation has followed an agonizing (and not yet completed) pathway to reach this appeal, in large part because of the careless pleading of the plaintiff, we find that the district court has committed no reversible error in its rulings. We therefore AFFIRM.

AFFIRMED

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8 Pursuant to Rule 54 of the Federal. Rules of Civil Procedure, Dailey sought and was granted severance and issuance of a final judgment of the dismissal and sanctions orders in the second and third suits. See Order of the District Court of April 12, 1995. This court therefore has jurisdiction over the appeal of those matters pursuant to 28 U.S.C. Sec. 1291.

No. 96-391

(2)

Supreme Court, U.S.
FILED
OCT 15 1996
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1996

OLLIE DAILEY,

*Petitioner,*

vs.

LTV AEROSPACE AND DEFENSE COMPANY,

*Respondent.*

CONSOLIDATED WITH

OLLIE DAILEY,

*Petitioner,*

vs.

VOUGHT AIRCRAFT COMPANY,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has determined that the District Court did not commit reversible error in prohibiting Petitioner from adding new or different causes of action to his already pending lawsuit?

2. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals determined that the District Court did not commit reversible error when it required Petitioner to assert his new claims in different actions?

3. Should this Court grant a writ of certiorari where the subsequent opinions granting summary judgment on Petitioner's new claims demonstrate that he would not have been entitled to a jury trial even if they had been added to his first action?

## LIST OF PARTIES

All parties are set forth in the caption to this matter. Pursuant to Rule 29.(6), Respondent LTV Aerospace & Defense Company's parent corporation was LTV Corporation. Certain assets of LTV Aerospace & Defense Company were sold and became Respondent Vought Aircraft Company, which was owned by Northrop Grumman Corporation and the Carlysle Group. Northrop Grumman Corporation subsequently became the sole owner of Vought Aircraft Company.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT:

Vought Aircraft Company (hereinafter referred to as "Vought") files this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit asking this Court to deny the Petition for Writ of Certiorari (hereinafter referred to as "Petition") to review the opinion issued on March 13, 1996 by the United States Court of Appeals for the Fifth Circuit. In support of this request, Vought respectfully shows the Court as follows:

## JURISDICTION

This Court's jurisdiction of this appeal is based on the judgment and opinion of the Fifth Circuit Court of Appeals entered on March 13, 1996. The Petitioner's suggestion for rehearing *en banc*, treated as a petition for panel rehearing as well, was denied by the Fifth Circuit on June 14, 1996. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254(1) and the Petition was timely filed within ninety days of the denial of the petition for rehearing as required by Rule 13.4, Supreme Court Rules.

## STATUTES INVOLVED

This appeal involves allegations of race discrimination and retaliation in violation of Title VII of the Civil

Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2000e-17 ("Title VII") and 42 U.S.C. § 1981, and disability discrimination in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213.[1] The case also involves application of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. The particular relevant statutory provisions are as follows:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race. . . .

42 U.S.C. § 2000e(2)(a) [Title VII].

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving

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[1] The cases also involved allegations of violation of the Rehabilitation Act, 29 U.S.C. § 793(b) and state law claims of intentional infliction of emotional distress. Those claims were dismissed by the District Court and were not appealed.

> notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(b) [Title VII].

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) [ADA].

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney

> General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12166 of this title, concerning employment.

42 U.S.C. § 12117(a)[ADA].

> If a complaining party seeks compensatory or punitive damages under this section –
>
> (1) any party may demand a trial by jury; . . .

42 U.S.C. § 1981(c)(1) [the '91 Act].

## STATEMENT OF THE CASE

### A. COURSE OF PROCEEDINGS AND OPINIONS BELOW.

Petitioner's summary of the opinions is partially correct, but is at best, confusing. Therefore, in order to clarify the proceedings below and avoid any additional confusion, Vought restates the history of the case as follows:

Petitioner Ollie Dailey (hereinafter referred to as "Dailey") brought three suits against Vought and its predecessor for alleged violations of various employment related statutes over the past several years. The first, *Dailey v. LTV Aerospace & Defense Company*, No. 3:91-CV-1327-X in the District Court and Appeal No. 95-10156 before the Fifth Circuit Court of Appeals (hereinafter referred to as "*Dailey I*"), alleged Vought discriminated against Dailey in and prior to October of 1990 on account

of his race, retaliated against him because he complained of discrimination, violated the Rehabilitation Act and intentionally inflicted emotional distress upon him. Dailey also sought to recover damages pursuant to the Civil Rights Act of 1991 (hereinafter referred to as "the '91 Act"). The District Court entered the following orders in *Dailey I*:

1. Dismissal of Dailey's claims arising under the '91 Act as the alleged discriminatory conduct at issue occurred before passage of that Act;

2. Striking of Dailey's final supplemental complaint, filed without leave of court, on the basis that the discrimination claims relating to Dailey's July 1993 layoff were too remote in time to his claims relating to his failure to return to work in October of 1990, which was the main issue in the suit, and there was not yet an EEOC charge filed challenging the layoff, and denying a subsequent attempt to add these claims a few weeks before trial;

3. Summary judgment in favor of Vought on Dailey's claims for intentional infliction of emotional distress and violation of the Rehabilitation Act;

4. Dismissal of Dailey's claim under the ADA relating to his attempt to return to work in October of 1992 in order to allow completion of the administrative process, and denial of the motion to reconsider that decision;

5. Removal of the case from the jury docket on the basis that Dailey's remaining claims arose before the effective date of the '91 Act and Dailey had not made a timely attempt to amend his previous charge of race

discrimination to include his October 1992 attempt to return to work; and,

6. After trial on the merits, issuing findings of fact and conclusions of law dismissing Dailey's remaining claims of race discrimination and retaliation and entering final judgment for Vought.

After the trial on the merits of *Dailey I*, but before judgment was rendered, Dailey filed suit against Vought alleging his July 1993 layoff was the result of race discrimination and retaliation in violation of Title VII, No. 3:94-CV-0325-G in the District Court, Appeal No. 95-10437 in the Fifth Circuit Court of Appeals (hereinafter referred to as "*Dailey II*"). He subsequently attempted to amend *Dailey II* to include three additional claims; that Vought violated the ADA, Title VII and § 1981 when it failed to return him to work in October of 1992. Before the District Court ruled on the motion to amend, Dailey withdrew that motion and filed a third action with the ADA, Title VII and § 1981 claims, No. 3:94-CV-1214-X in the District Court, Appeal No. 96-10437 in the Fifth Circuit Court of Appeals (hereinafter referred to as "*Dailey III*"). *Dailey III* was subsequently consolidated with *Dailey II* and both cases were transferred to the District Court that heard *Dailey I*.

In the consolidated action of *Dailey II* and *Dailey III* the District Court ruled as follows:

1. With regard to the layoff claim, Dailey had presented no more evidence of discrimination than he presented during the trial of *Dailey I*, which was insufficient to demonstrate any race discrimination or retaliation occurred justifying summary judgment for Vought;

2. Dailey and his counsel failed to conduct a reasonable inquiry into the facts before filing *Dailey II* challenging the layoff, supporting the imposition of sanctions against both Dailey and his counsel;

3. Dailey's Title VII claim challenging his inability to return to work in October of 1992 asserted in *Dailey III* had already been ruled on and disposed of in *Dailey I*;

4. Dailey's § 1981 claim challenging his inability to return to work in October of 1992 asserted in *Dailey III* was barred as it could have been asserted in *Dailey I*; and

5. Sanctions under Rule 11 were appropriate against both Dailey and his counsel for filing the Title VII and § 1981 claims in *Dailey III*.[2]

The District Court granted Dailey's motion to sever the Title VII, § 1981 and sanctions rulings in *Dailey III*. *Dailey I, II* and those issues from *Dailey III* which were severed were consolidated before the Fifth Circuit Court of Appeals. In that consolidated Appeal, Dailey challenged the District Court's dismissal of his claims under the '91 Act and removal of the case from the jury docket; refusal to permit his layoff claim to be added to *Dailey I*;

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[2] Dailey has not challenged the amount of those sanctions in this Petition. Moreover, as a result of the failure to pay those sanctions, Dailey's counsel was suspended from practicing law in the United States District Court for the Northern District of Texas and the Fifth Circuit Court of Appeals until the sanctions were paid, which has now occurred. *See* Appendix at 35a-46a. Dailey's counsel apparently did not inform the Court of this suspension, which was pending when the Petition was filed, as required by Rule 8, Supreme Court Rules.

dismissal of the ADA claim in *Dailey I* pending completion of the administrative process; entry of summary judgment for Vought on his layoff claim in *Dailey II*; dismissal of his Title VII claim in *Dailey III* on the basis it had been ruled upon in *Dailey I*; dismissal of his § 1981 claim in *Dailey III* as it could have been brought in *Dailey I*; and, entry of sanctions against Dailey and his counsel.[3] The Fifth Circuit Court of Appeals affirmed each and every ruling made by the District Court, finding that no reversible error had been committed.

## B. STATEMENT OF FACTS.

While Dailey's statement of the facts is partially correct, it is incomplete and contradicts many of the findings made by the District Court. As Dailey did not appeal the findings of fact and conclusions of law entered by the District Court, they are binding for purposes of this Petition. Many of the allegations made by Dailey have already been conclusively resolved by the District Court in a manner which does not support Dailey's rendition of the facts. For what would appear to be obvious reasons, Dailey did not include the District Court's findings with his Petition. Therefore, for the Court's edification, they are attached hereto as an Appendix.

In addition to failing to include the findings of fact, which are controlling, Dailey's statement of facts is full of inadmissible and non-record evidence, opinion, argument, invective and attacks on the lower court judges.

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[3] Dailey did not appeal the findings of fact and conclusions of law entered by the Court after the trial of *Dailey I*.

The following statements made by Dailey are inaccurate, inadmissible or not contained within the record:

1. Dailey alleges he filed a charge of disability discrimination with the EEOC after he was not returned to work in October of 1990. Petition at 5. The only EEOC charge filed at that time, however, alleged race discrimination and retaliation, not disability discrimination as the ADA was not even effective until July of 1992.

2. There is no evidence in the record that Mr. Skinner's comments about interracial marriages were made during a discussion of a campaign flier which had been defaced. Petition at 5. In fact, as the District Court found, Dailey did not complain about the defacing of his campaign literature until four months after it occurred. Appendix at 3a, ¶ 18.

3. There is no evidence that the District Court ever attempted to limit the trial of *Dailey I* to only two days. Petition at 8. This allegation is apparently made in order to demonstrate there is some basis for Dailey's allegations that he and his counsel have been abused by both the District Court and Court of Appeals. This allegation, however, was not raised before either the District Court or Court of Appeals.

4. Dailey also takes a statement of the District Court out of context, alleging the District Court accused him of being "greedy" and threatening him with years of appeals. Petition at 9. There is no evidence in the record of these statements, nor was this allegation raised before the Court of Appeals.

5. There is no evidence of what settlement offers were made during trial of *Dailey I*, yet Dailey informs the Court about settlement discussions. Petition at 9. Offers of settlement which may have been made are not admissible, are not contained in the record of this matter, and are not relevant to disposition of this Petition. *See* Rule 408, Federal Rules of Evidence.

6. The District Court did not find that Dailey's layoff claims were duplicative of the claims asserted in *Dailey I*. Petition at 10. Rather the District Court held that Dailey presented no more evidence of discrimination than he had presented during trial of *Dailey I*, which was insufficient to demonstrate that a violation of Title VII had occurred. Petition at 21a, 27a.

7. Dailey's rendition of the facts on pages 12 and 13 of the Petition is no more than additional argument, which will properly be addressed *infra*.

8. In his argument, Dailey incorrectly states the Department of Labor had ordered Vought to reinstate him and that there was no avenue of appeal, a fact conveyed to Vought.[4] Petition at 6, 13. There is no evidence to support these statements.

9. Dailey incorrectly asserts that the District Court in *Dailey I* simply "declined to consider" his claims that

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[4] Although the Department of Labor charge was settled and Dailey agreed not to use the settlement agreement, which contained the Department of Labor's initial findings, for any purpose, over objection of counsel, during the course of trial and continuing through these appeals, Dailey has repeatedly violated the terms of that settlement agreement.

he was the victim of race discrimination and retaliation when he was not permitted to return to work in October of 1992. Petition at 19-20. The District Court found that Dailey did not have a Title VII claim arising out of the October of 1992 events as he failed to include anything other than disability discrimination as basis for the EEOC charge he filed concerning October of 1992 attempt to return to work. Petition at 14a. The issue was whether Dailey had a valid Title VII race discrimination claim relating to October of 1992 and the District Court held a race discrimination claim could not lie unless an EEOC charge had previously been filed. Petition at 14a, 15a.

10. Dailey also alleges he argued to the District Court in *Dailey I* that he had filed a race discrimination charge concerning his October of 1992 inability to return to work, justifying inclusion of that claim in that first suit. Petition at 8. That statement is not supported by the record as Dailey argued he did not file a charge because it was not necessary to do so.

## ARGUMENTS SUPPORTING DENIAL OF THE PETITION

### A. THE DECISIONS OF THE DISTRICT COURT NOT TO PERMIT DAILEY TO ADD NEW AND DIFFERENT CAUSES OF ACTION TO *DAILEY I* WERE CORRECT AND DO NOT WARRANT REVIEW BY THIS COURT.

#### 1. The Decision of the District Court to Dismiss Dailey's Title VII claim relating to October of 1992 was correctly affirmed by the Fifth Circuit.

Dailey argues that once he filed his first lawsuit against Vought, he should have been allowed to continue

asserting new and different causes of action at his whim, including up until the eve of trial. In support of this argument, Dailey contends that Vought's actions constituted a continuing violation and that the additional actions were all related acts of discrimination against Dailey. There is, however, no legal support for Dailey's position.

The Fifth Circuit and District Court correctly determined that Dailey was required to file new EEOC charges for the subsequent actions which he alleges constituted discrimination. That determination was consistent with previous Fifth Circuit precedent, as that court has held:

> Discrete acts of discrimination which occur after the filing of an EEOC complaint must first be reviewed administratively before such acts may serve as the basis for a finding of discriminatory conduct justifying remedial action by the court.

*Ray v. Freeman*, 626 F.2d 439, 442 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981). The Fifth Circuit noted that additional claims could be made if they served to clarify the existing ones, not to add new acts of discrimination. *Id.* at 443. In the instant case, Dailey attempted to add an entirely new complaint – that he was not reinstated in October of 1992 – two years after he filed his original race discrimination charge. The failure to be rehired or reinstated is a separate and distinct action for which a separate charge must be filed. *Woodburn v. LTV Aerospace Corp.*, 531 F.2d 750, 751 (5th Cir. 1976); *Redd v. Fisher Controls*, 814 F. Supp. 547, 548-50 (W.D. Tex. 1992), *aff'd*, 35 F.3d 561 (5th Cir. 1994); *see also Kuriakose v. Howard University*, 35 Fair Emp. Prac. Cases (BNA) 1601, 1602 (D.D.C. 1984) (finding no statutory, case law or common

sense support for the proposition that a violation continues until an individual is rehired).

Contrary to Dailey's assertions, the Fifth Circuit's decision did not conflict with previous decisions rendered by it, by other Courts of Appeals, or with any decisions rendered by this Court. Two years after he was denied the opportunity to return to work, he attempted to return again, even though there had been no real change in his circumstances – he still asserted he could return only with a twenty pound lifting restriction. It is clear that this new attempt to return was designed solely to permit him to file an EEOC charge alleging disability discrimination. The ADA became effective in July of 1992 and Dailey wanted to assert more claims against Vought. The District Court correctly held that a continuing violation was not something that continued indefinitely into the future, but was a theory used to permit introduction of past actions which occurred either before the passage of Title VII or occurred outside the 300 day time period for filing a charge of discrimination. *Rendon v. AT&T Technologies*, 883 F.2d 388, 395 (5th Cir. 1989). Dailey easily could have included any additional type of discrimination on his October 1992 EEOC charge. The fact that he did not choose to assert anything other than disability discrimination does not demonstrate that the District Court was incorrect in not allowing him to attempt to change the basis for his charge long after the time period for so doing had expired.[5]

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[5] Dailey also alleges that after the District Court dismissed his October 1992 Title VII claim he returned to the EEOC and reopened his ADA charge. Dailey cites no authority for the

Since Dailey did not file a Title VII discrimination charge challenging his October of 1992 attempt to return to work, the District Court correctly held that he could not assert a Title VII claim, either in *Dailey I* or subsequently. The Fifth Circuit correctly affirmed that decision based upon its own precedent and precedent from other circuits. Accordingly, there is no basis or reason for this Court to further review those decisions and the Petition should be denied.

**2. The Fifth Circuit correctly affirmed the District Court as it did not abuse its discretion in refusing to permit Dailey to add his layoff claims to *Dailey I*.**

Dailey also complains that the District Court should have permitted him to add claims that Vought violated Title VII and the ADA when he was laid off based upon his seniority in July of 1993, and that the Fifth Circuit incorrectly affirmed those decisions. Dailey's main argument centers solely around his desire to have had a trial by jury on all of his claims. In making that argument, however, Dailey fails to acknowledge the standard governing the District Court's actions.

The standard for reviewing a district court's decision not to permit an amendment to the pleadings is abuse of discretion. *See Ashe v. Corley*, 992 F.2d 540, 542-43 (5th Cir.

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proposition that an administrative agency can overrule a district court and reopen a claim which has already been dismissed as untimely. Indeed, common sense would indicate no such authority exists nor could exist in the present judicial system.

1993). In *Dailey I*, Dailey made two attempts, both after the deadline for filing amendments to the pleadings, to add his layoff claims to that suit. The District Court could have simply denied both requests as being untimely. *Woods v. Whitley*, 933 F.2d 321 (5th Cir. 1991); *Gregory v. Mitchell*, 634 F.2d 200, 203 (5th Cir. 1981). With regard to the first attempt to amend, the District Court noted that Dailey had not fulfilled the administrative prerequisites as no EEOC charge had been filed challenging his layoff. As set forth *supra*, a new EEOC charge is required when challenging new or different actions of an employer. *Ray, supra*, 626 F.2d at 442. Therefore, the District Court correctly denied the first motion to amend.

When the second untimely motion to amend was filed the District Court determined that as the discovery cutoff had passed and the case was ready for trial, Vought would be prejudiced if Dailey were permitted to inject entirely new issues into the trial. Finding that one party would be prejudiced by the amendment is a legitimate reason for denying a motion to amend and does not demonstrate an abuse of discretion. *Ashe, supra*, 922 F.2d at 542-43. Dailey was not denied the opportunity to pursue his layoff claims, he was just denied the opportunity to insert them in a case which was going to trial in less than a month. Under these circumstances there could be no abuse of discretion by the District Court and the Fifth Circuit correctly affirmed each of those decisions. Since the issue is not new to the federal judicial system and there are no conflicting decisions from any circuit court, there is no basis upon which to grant Dailey's Petition on this issue.

### 3. The District Court was also correct in requiring Dailey to complete the administrative process before litigating his ADA claim arising out of his October of 1992 attempt to return to work.

Dailey argues that the District Court should have permitted him to litigate his October 1992 ADA claim in *Dailey I* even though it was still in the conciliation process at the EEOC. His argument is predicated on his belief that there would be no settlement, so he was excused from satisfying the administrative prerequisites. As the District Court so astutely noted "so much for good faith efforts at settlement as required by Local Rule 9.1(a) and the good faith participation in the administrative process. . . . " Petition at 18a. Dailey argues that conciliation is not a right of a defendant in a discrimination matter. While that may be true, it ignores the fact that the statute itself requires that the parties engage in conciliation in an attempt to avoid litigation. There is no authority, from this Court, the circuit courts, or Congress itself, that permits a discrimination plaintiff to determine when, whether and how to satisfy these prerequisites. The District Court correctly held that Dailey's ADA claim regarding his October of 1992 attempt to return to work was premature and that it could not properly be asserted until the administrative process was completed. *See Johnson v. United States*, 522 F.2d 1128, 1130-31 (8th Cir. 1975) (holding the requirement that the administrative prerequisites will not be waived merely because a plaintiff believes they will be unsuccessful); *Khader v. Aspin*, 1 F.3d 968, 971 (10th Cir. 1993) (holding the administrative process will

not be waived merely because a complainant is frustrated with the process).[6]

Dailey also attempts to argue that he was prejudiced by bureaucratic ineptitude and even frames one of his questions at issue to imply this Court should resolve the issue of whether a plaintiff who inadvertently files with the wrong federal agency should be penalized for that filing. That issue, however, was not presented to the District or Circuit Courts and seeks to imply that situation occurred in the instant matter. What actually occurred, however, was succinctly summarized by the District Court:

> Plaintiff filed a complaint with the OFCCP on November 12, 1992, alleging disability discrimination, a charge arising under both Section 503 [of the Rehabilitation Act] and the ADA. On November 20, 1992, he filed a separate ADA charge with the EEOC, challenging the same action as in the OFCCP complaint. Plaintiff apparently did not inform the EEOC that he had already filed the OFCCP complaint, and the EEOC therefore did not decline to accept the charge or dismiss it, but instead issued a right to sue letter. Plaintiff concedes that if the OFCCP complaint is settled, his ADA claims will be moot as a result. He contends that the flaw in Defendant's reasoning is that the OFCCP complaint may be settled.

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[6] The District Court also noted that as the matter was ready for trial, it was too late to inject yet another new cause of action into the case. Again, this ruling was based upon common sense and the avoidance of prejudice, and it did not constitute an abuse of discretion. *Ashe, supra*, 922 F.2d at 542-43.

> It appears that Plaintiff has managed to create just the sort of confusion and duplication of effort that Congress attempted so copiously to prevent by delegating authority to the administering agencies to harmonize potential duplication between the Rehabilitation Act and the ADA. Because the EEOC, had it known of Plaintiff's earlier OFCCP complaint, would have declined Plaintiff's ADA complaint, it would not have issued a right to sue notice. Rather than add to the confusion that Plaintiff has created, the Court determines that the better course of action would be to allow the administrative process to operate the way Congress intended, and dismiss Plaintiff's ADA claims. As both parties agree, if the OFCCP process is successful, the ADA claims are moot, if not, it will be referred to the EEOC for conciliation, and Plaintiff may then pursue it as he likes.

Petition at 8a. Any problems created by filing with one agency not the other were created by Dailey and are not the result of improper interpretation of the law by the courts such that this Court should consider the issues raised by Dailey. Since the District Court and Fifth Circuit decisions were consistent with the statutory mandates and the precedent of all other circuits, there is no basis upon which to grant Dailey's Petition as it applies to his ADA claims.

## B. BY ALLOWING DAILEY TO ASSERT HIS OTHER CLAIMS IN OTHER LAWSUITS, NEITHER THE DISTRICT COURT NOR THE FIFTH CIRCUIT VIOLATED ANY OF DAILEY'S CONSTITUTIONAL RIGHTS.

Dailey's main argument is that by denying the various motions to amend and by not permitting him to

assert claims which were not supported by an underlying EEOC charge, the lower courts denied him of his constitutional right to have a jury decide each and every one of his claims. It is his contention that even though his various claims arose at different points in time, he was entitled to have all his claims decided in a single lawsuit, with a jury as the finder of fact. One of Dailey's complaints is that the District Court incorrectly removed *Dailey I* from the jury docket. The District Court removed the case from the docket as the only claims remaining for trial in *Dailey I* were Dailey's Title VII race and retaliation claims relating to the time period up to and including October of 1990. Since the '91 Act has been held not to be retroactive, the District Court's ruling was correct and the Fifth Circuit's affirmance is also correct.

Dailey relies upon *Lytle v. Household Manufacturing*, 110 S. Ct. 1331 (1990), to support his argument that he was improperly denied the right to a trial by jury on his claims. The facts of *Lytle*, however, are clearly distinguishable and do not provide support for Dailey's argument. In *Lytle*, the plaintiff simultaneously brought both a Title VII and § 1981 claim over a single event. The district court determined that the Title VII claim, which was to be heard by the court, should be heard before the § 1981 claim, which would be heard by a jury. This Court, however, found that process to violate the plaintiff's seventh amendment right to a trial by jury on his legal claims, as any findings made by the court in the Title VII trial would be binding on the jury in the § 1981 trial.

Unlike *Lytle*, Dailey did not bring a § 1981 claim concerning his inability to return to work in October of 1990. Therefore, his claims were not split. Since he was

not entitled to a jury trial on his October of 1990 Title VII claims, the District Court committed no error in holding a bench trial in *Dailey I*.

The only race discrimination claims asserted in *Dailey I* concerning Dailey's unsuccessful attempt to return to work in October of 1992 were his Title VII claims. As set forth *supra* those claims were properly dismissed as Dailey failed to satisfy the administrative prerequisites necessary to bring that action. Dailey did not allege, in *Dailey I*, that § 1981 was violated in October of 1992, although he clearly could have done so. Apparently, Dailey believes he was entitled to a jury trial because a § 1981 claim could have existed, even though he failed to assert it.

The doctrine of *res judicata* (also referred to as collateral estoppel) is used to prevent litigation of claims which were previously litigated **as well as claims that could have been litigated in a previous lawsuit**. *Ocean Drilling & Exploration v. Mont Boar Rental Services, Inc.*, 799 F.2d 213, 216 (5th Cir. 1986); *Nilsen v. City of Moss Point*, 701 F.2d 556, 560 (5th Cir. 1983) (en banc); *Stevenson v. International Paper Co.*, 516 F.2d 103, 108 (5th Cir. 1975). This doctrine has been used to prevent subsequent employment discrimination litigation involving the same facts, yet arising under a different statute. *Mills v. Des Arc Convalescent Home*, 872 F.2d 823, 826 (8th Cir. 1989); *Nilsen, supra*, 701 F.2d at 563. Dailey could have and should have asserted his § 1981 claim in *Dailey I* when he attempted to assert his Title VII claim. His failure to do so not only justified the District Court's removal of *Dailey I* from the jury docket, but it also justified the District Court's dismissal of the § 1981 claim when it was asserted in subsequent litigation in *Dailey III*. By dismissing the

§ 1981 claim in *Dailey III* on the basis that it should have been included in *Dailey I*, the District Court did not deny Dailey a jury trial. Any error was committed by Dailey in not asserting his § 1981 claim in a timely manner.

The District Court also dismissed Dailey's Title VII claims in *Dailey III* on the basis it had already ruled that Dailey could not assert those claims in *Dailey I* as he had not satisfied the administrative prerequisites. While Dailey prefers to characterize that decision as an invitation to file another lawsuit, it cannot logically be read that way. The District Court clearly decided that Dailey's Title VII claims relating to October of 1992 were not timely. Petition at 14a-15a, 24a. Since it is proper to dismiss subsequent litigation of issues already decided, the District Court was correct in dismissing the Title VII claims asserted in *Dailey III*. *Montana v. United States*, 99 S. Ct. 970, 973 (1979).

Any procedural problems resulting in Dailey's inability to have a jury decide *Dailey I* were not caused by the District Court splitting any claims. Rather, Dailey's failure to satisfy the administrative prerequisites on his Title VII October 1992 claim and his failure to assert his § 1981 claim in *Dailey I* created a situation in which no jury issues existed in *Dailey I*. In addition, since the District Court had already dismissed the October 1992 Title VII claims in *Dailey I*, there was no basis to allow those same claims to be litigated in *Dailey III*.[7] There being no error by either the District Court or the Court of Appeals with

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[7] *See supra* footnote 5.

regard to the dismissal of these claims, there is no reason to grant the Petition.

### C. DAILEY'S REMAINING CLAIMS WERE DISMISSED ON SUMMARY JUDGMENT GROUNDS, DEMONSTRATING HE WOULD NOT HAVE HAD ANY CLAIMS TO GO BEFORE A JURY EVEN IF ALL HIS CLAIMS WERE ASSERTED IN *DAILEY I*.

Dailey's arguments center around his contention that had he been allowed to assert all his claims against Vought he would have received a trial by jury, and apparently would have received a different result. What Dailey does not recognize, however, is that the claims that were asserted in *Dailey II* and *Dailey III* were so weak as to be unable to withstand a motion for summary judgment. Therefore, it is clear that even if all the claims had been asserted in a single action, those claims entitling him to a jury trial would have been disposed of short of trial in any event. As set forth above, the Title VII and § 1981 claims surrounding Dailey's October of 1992 attempt to return to work were properly disposed of on the basis that there was no underlying EEOC charge to support the Title VII claim and the § 1981 claim was barred by the doctrine of *res judicata* as it was never asserted in *Dailey I*. That leaves only Dailey's layoff and ADA claims as those which may have been heard by a jury.

On the layoff claim, Vought presented evidence of a legitimate non-discriminatory reason for Dailey's layoff – it was required by the terms of the collective bargaining agreement, based upon Dailey's seniority. The District Court, in *Dailey I*, held that Dailey did not present any

evidence to prove the reasons advanced by Vought in that case were merely a pretext for discrimination. In response to the motion for summary judgment in *Dailey II*, Dailey merely reiterated the same evidence he had presented in *Dailey I*. The District Court held that since Dailey had presented no more evidence of discrimination than that which had already been held to be insufficient in *Dailey I*, he could not defeat the motion for summary judgment. Likewise, on the ADA claim in *Dailey III* that remained before the District Court, Vought was also granted summary judgment.[8] Therefore, since he could not overcome those motions, he did not have sufficient evidence to go before a jury with either his layoff or ADA claims. If Dailey had been permitted to amend his complaint to include those additional causes of action in *Dailey I*, it is clear that they would have been disposed of before trial. That result would have, once again, left only Dailey's Title VII claims relating to October of 1990 as the ones to be tried. As even Dailey recognizes, those claims do not entitle him to a trial by jury.

What Dailey would like this Court to do is find that there were procedural errors committed which justify throwing out all the decisions of the lower courts and allow him to retry all his claims in one single suit. Since the District Court has determined that most of Dailey's claims do not raise any genuine issues of material fact and that Vought was entitled to judgment as a matter of law, a remand would be a purely theoretical exercise

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[8] Dailey has appealed that decision and it is currently pending before the Fifth Circuit, Case No. 96-10286. Appendix at 18a-34a.

resulting in a tremendous waste of judicial resources. Vought would submit that when the record is clear that there will be no different result in a retrial, then there is no basis for reversing the lower courts. *See, e.g., Halbert v. City of Sherman, Texas*, 33 F.3d 526, 530 (5th Cir. 1994). Therefore, the Court should deny Dailey's Petition.

## CONCLUSION

Dailey has not identified any provision of the District Court's decisions or the Fifth Circuit's decision affirming the District Court which conflicts with a decision of this Court. Nor has he challenged any of the findings of fact entered by the District Court. What Dailey is attempting to do is wipe the slate clean and start all over again. Were his arguments adopted, litigation involving employees would rarely become final as employees could just continue to raise new claims on the eve of trial and split causes of action in order to get more than one bite at the apple. This result is not justified by the precedent of this Court or any other federal court. Dailey has not identified any conflict between the circuits nor critical issue which warrant consideration by this Court. For the reasons set

forth above, Vought respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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|---|---|---|
| OLLIE DAILEY, | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | |
| | § | |
| LTV AEROSPACE AND | § | CASE NO. |
| DEFENSE COMPANY, | § | 3:91-CV-1327-X |
| | § | |
| Defendant. | § | |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, after hearing the trial on the merits of all claims remaining in the above referenced matter and after a careful review of the evidence, and argument, the Court enters the following findings of fact and conclusions of law. Any finding of fact which is a conclusion of law is deemed to be such, and vice versa.

### FINDINGS OF FACT

1. Plaintiff Ollie Dailey (hereinafter "Dailey"), is an African American male who was hired by LTV Aerospace and Defense Company (hereinafter "LTVAD") in 1984 as a numerical control machinist, B class.

2. A B class machinist is a lower skilled position than an A class machinist. From January 10, 1990 through October of 1990, Dailey worked as a B class machinist in department 161-5.

3. In August of 1992, part of the aerospace operations of LTVAD were sold and became Vought Aircraft

Company (LTVAD and Vought Aircraft Company will hereinafter be referred to as "the Company"),

4. Dailey remained an employee until July 31, 1993, when he was laid off.

5. In January of 1990, Dailey injured his back. At that time, he was working on the third shift.

6. Dailey filed a workers' compensation claim for the January 1990 injury.

7. On January 9, 1990, Dailey's physician Dr. A. J. Morris limited him to lifting to [sic] more than 25 pounds.

8. The Company honored Dailey's restriction by allowing him to choose which machines he would work on that would not violate his restrictions.

9. On February 7, 1990, Dailey's physician indicated Dailey could not perform any work and Dailey was placed on leave.

10. At the end of February 1990, Dailey returned to work with a 15 pound lifting restriction.

11. Once again, the Company honored Dailey's restrictions by permitting him to choose the machines on which he would work.

12. Despite the Company's accommodation, Dailey argued that the work he was doing exceeded his restrictions.

13. Although Dailey contended he could not perform the work he assigned, his supervisors observed that he was able to do the work, despite his protestations to the contrary.

14. In May of 1990, Dailey was transferred to the first shift.

15. Dailey filed a grievance alleging the work he was doing exceeded his restrictions in June of 1990. In order to determine whether the work was within Dailey's restrictions, the Company had an agronomic evaluation conducted on the machine on which Dailey had chosen to work. That study demonstrated that the work Dailey was performing required him to lift no more than 14.92 pounds, which was within his restriction of not lifting more than 15 pounds.

16. Dailey was receiving therapy for his back injury, which interfered with his ability to work the first shift. Therefore, as an accommodation to Dailey, the Company transferred him back to the third shift in July of 1990 to enable him to continue to receive therapy.

17. In September of 1990, Dailey was transferred back to the first shift as the Company could not continue to use him on the third shift because he was not productive, since he was limited in the work he could perform. The Company determined he would be more productive on the first shift. There was no supervision on the third shift. After Dailey was transferred back to the first shift, there were no B class employees on the third shift (Dailey was a B class machinist) in department 161-5.

18. On October 15, 1990, Dailey filed an EEOC charge contending that he was transferred back to the first shift in September of 1990 because of his race. Dailey also complained that he had been denied training on the newer machines since October of 1989 because of his race.

19. The machines on which Dailey desired to be trained were 5 axis K & T machines. The employees who had been in the unit the longest received training on new equipment. Dailey was relatively new to the unit. Because of his restrictions Dailey was unable to perform all work on those machines. Therefore, he did not receive training prior to October of 1990.

20. On September 5, 1990, Dailey's physician submitted two separate forms detailing Dailey's restrictions. One said that Dailey's lifting restriction was changed from 15 pounds to 50 pounds "as tolerated". The other said that Dailey could not engage in prolonged standing, walking, lifting and/or bending, but did not limit the amount that Dailey could lift.

21. On September 25, 1990, Dailey's restrictions changed again, and Dailey was limited to not lifting more than 25 pounds.

22. On September 30, 1991, the EEOC determined that Dailey was not discriminated against with regard to the suspension and failure to return him to work.

23. On October 16, 1990, when he arrived at work, Dailey found that his tool box had been moved. He became very angry and abusive and began yelling obscenities, including "tell those fucking white boys to leave my tool box alone." Several co-workers complained about Dailey's statements and treatment of them.

24. An investigation was conducted by labor relations, which included talking to Dailey. Although Dailey admitted to making the above comment, he refused to provide a statement to labor relations.

25. Dailey was sent home on October 16 pending the outcome of the labor relations investigation.

26. Three days later, on October 19, while the investigation into his abusive conduct was pending, Dailey went to his physician and received a note indicating the he was not capable of working. I find this and the previous lifting restrictions cited above were based on the subjective views of Dailey and not based on any reasonable medical diagnosis of him by Dr. A.J. Morris.

27. I find that Dr. Morris would provide documents on his letterhead that said whatever Dailey wanted them to say and would be stamped with his facsimile stamp by the Doctor's secretary. I find that on these occasions Dr. Morris was selling Dailey stationery with Dailey's input for the purpose of giving it to others for their action in reliance thereon, as opposed to giving him documentation of the Doctor's medical diagnosis and treatment of Dailey.

28. The investigation by labor relations revealed that three other employees had been disciplined for making abusive or derogatory statements in the workplace. Each of those employees was white and each received a three day suspension.

29. On October 22, 1990, Dailey was directed to report to labor relations, at which time he was told that he would receive a three day suspension for his abusive outburst on October 16, 1990.

30. During the October 22 meeting in labor relations, Dailey presented his physician's note that stated he could not work. Dailey's supervisors informed him that

given that his restrictions kept changing and that Dailey contended he could not work within his restrictions, there was no B class machinist position available for him. Dailey was then sent to the medical department.

31. On October 23, 1990, Dailey filed an EEOC charge alleging that he was suspended on account of his race and in retaliation for complaining about discrimination in the workplace.

32. Dailey had another appointment with his physician on October 26, 1990. He received another release which stated Dailey could return to work when his lifting restriction of 20 pounds was honored by the Company. Since Dailey's restrictions kept changing, and Dailey had indicated he could not work within the previous 15 pound limitation, the Company determined that there was no B class machinist position available for him.

33. On November 6, 1990, Dailey amended his previous EEOC charge challenging his suspension to allege that he was not being returned to work on account of his race and in retaliation for having made previous complaints.

34. Also on November 6, 1990, Dailey filed a complaint with the Office of Federal Contract Compliance Programs (hereinafter "OFCCP"), alleging he was not returned to work on account of his race and because he was handicapped.

35. On November 15, 1990, Dailey's physician responded to a letter from the Company medical director indicating that Dailey would never be able to perform the B class machinist job.

36. On December 5, 1990, Dailey's physician submitted a disability form to the Company stating that Dailey was unable to perform any work. In relation to the Plaintiff's workers' compensation claim an independent medical evaluation was done. Plaintiff's own exhibit 52, a report dated March 11, [sic] 1991, from the examining physician, one John G. Steele, M.D., contains the following:

> *. . . he continued to work until October, 1990, when he indicates that his foreman did not wish to live with this [weight] restriction any longer and he was forced to go off duty again. (emphasis added)*

As one can easily see, and the Court finds, in March of 1991 Plaintiff Ollie Dailey told this doctor involved in the workers' compensation case (when it suited his particular litigation purposes at that particular time) that the employment decisions of October 1990 were because of the weight *restriction*, not race, retaliation or because of any "setup".

37. On August 26, 1991, Dailey's physician released him to work with a 10 pound 6 restriction. Dailey obtained the release in order to determine whether there was another position in the Company which he could fill.

38. In accordance with the procedure on returning union employees to work, a return to work committee canvassed the existing job openings to determine if there was a job which Dailey could perform with the 10 pound lifting restriction. A Tank/Cabin Sealer position was available, but it required that Dailey obtain a security clearance.

39. Dailey was not qualified to receive the security clearance because he had a criminal record. I find that this is why he was not offered the Tank/Cabin Sealer position.

40. After Dailey was denied that position, his physician submitted another form to the Company, on December 4, 1991, indicating that Dailey was unable to perform any work.

41. In December of 1991, Dailey's physician also submitted a form to the Texas Rehabilitation Commission stating that Dailey could perform some work, but that he had a five pound lifting restriction.

42. On December 16, 1991, Dailey's physician again increased his lifting limitation to 20 pounds.

43. On February 14, 1992, Dailey's physician submitted another form to the Company stating that Dailey was unable to perform any work.

44. As noted above, the Court finds as a fact that these changing restrictions are a sham and based on the evidence at trial the doctor's office was selling the Doctor's stationery to the Plaintiff and would put in writing whatever Plaintiff Ollie Dailey requested.

45. On February 14, 1992, the OFCCP determined that there was no discrimination, primarily because Dailey's restrictions kept changing and the Company could not determine what he was capable of doing on the job. Therefore, it dismissed his claim.

46. On April 8, 1992, Dailey's physician reaffirmed that Dailey was unable to perform any work, and further stated that the previous lifting limitation of 20 pounds

was for rehabilitation purposes only and was no longer applicable.

47. In September of 1992, Dailey's workers' compensation case went to trial and he *was awarded* damages *by the* jury.

48. *After* Dailey's workers' compensation trial was concluded, Dailey's physician again released him to work with a twenty pound lifting restriction. The restrictions did not continue to change after Dailey received his workers' compensation award.

49. Dailey attempted to return to his position as a B class machinist on October 6, 1992, with the new 20 pound lifting restriction. Dailey was not permitted to return to work. Dailey did not file a race discrimination charge challenging that decision.

50. Dailey was placed on layoff status on July 31, 1993.

## CONCLUSIONS OF LAW

1. The Company is an employer covered by Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. 2000e(b).

2. Dailey's first claim is that he was transferred from the third shift to the first shift in September of 1990 on account of his race. In order to prove a prima facie case of discrimination, Dailey must demonstrate that he was qualified to remain on the third shift, i.e., that there was work he could perform on that shift. Dailey failed to satisfy this burden. Dailey was working under limitations in September of 1990, which even he admits limited the

type of work he could perform. The Company demonstrated that there was insufficient work for him to do on the third shift and Dailey presented no evidence to demonstrate the contrary.

3. Even if Dailey could demonstrate the existence of a prima facie case, the Company has articulated a legitimate, non-discriminatory reason for the transfer. The Company stated that Dailey could not continue to work on the third shift because he was not operating at 100% efficiency because of his restrictions. In addition, there was no supervision on the third shift. A11 [sic] employees on that shift, other than Dailey, were A class machinists who could handle any work that had to be done. No B class machinists remained on the third shift after Dailey was transferred.

4. Dailey presented no evidence of pretext. He testified repeatedly that he believes that discrimination is the root of all his problems, but such beliefs are not sufficient to demonstrate that the Company's reasons were a pretext for discrimination. *Aquamina v. Eastern Airlines, Inc.*, 644 F.2d 506 (5th Cir. 1981). He presented no evidence that other employees were treated differently. Nor did he present any evidence from which it could reasonably be inferred that the Company decided to transfer Dailey because he is an African American.

5. Dailey's second claim is that he was denied training on new equipment on account of his race and had been denied such training since October of 1989. There is no evidence that Dailey was not otherwise qualified to participate in the training from October of 1989 until

January of 1990, so Dailey has established a prima facie case.

6. The Company articulated a legitimate non-discriminatory reason for not training Dailey. All employees would eventually be trained on the new equipment. Training was generally done by class and seniority, although the supervisor did have discretion as to when to train employees. When Dailey transferred into the department in October of 1989, there were employees already in the unit who had more seniority than him who were also awaiting training. They were trained before Dailey. After January of 1990, Dailey was unable to do all the functions of his job because of his injury. Since the Company wanted to obtain maximum efficiency on the new equipment, it did not make sense to train Dailey, since he could not fully operate the equipment. Dailey left the workplace in October of 1990 and did not return. Therefore, he was not trained. Had he remained in the workplace and had his physician not indicated he was incapable of any work, he would have been trained on the equipment when time and productivity permitted.

7. Dailey also failed to present any evidence of pretext. Once again, his main support is his belief that he was not trained because of his race. Dailey also alleges that other black employees did not receive training until they complained that they had not been trained. Yet, the evidence demonstrated that the Company trained black, white and Asian employees and eventually trained all employees. No other employees had the same restrictions as Dailey, yet were permitted to train on the new equipment. The Defendant prevails on this claim.

8. The Plaintiff next complains about his three day suspension. Although Dailey admits to angrily and loudly making a derogatory remark using profanity in the workplace, he contends that he did not deserve to be suspended for three days and that he received the suspension on account of his race and because he previously complained about discrimination. The burden of establishing the inference of discrimination necessary to show a prima facie case of race discrimination may be satisfied as follows:

> In work-rule-violation discharge cases, to establish an inference of discrimination, the plaintiff must establish at trial by a preponderance of the evidence, "either that he did not violate the rule, or that, if he did, white employees who engaged in similar acts were not punished similarly." *Green v. Armstrong R.R. Co.*, 612 F.2d 967 (5th Cir. 1980); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1254-55 (5th Cir. 1977).

*Gunner v. Chevron USA*, 684 F. Supp. 916, 920 (E.D. Tex. 1988). Dailey admitted to making the statement "tell those fucking white boys to leave my tool box alone". Therefore he cannot claim that he did not violate the rule against such behavior in the workplace. Moreover, he presented no evidence that other, white employees who engaged in similar behavior were treated differently. In fact, the Defendant established that they were treated the same. Therefore, he cannot establish a prima facie case of discrimination.

9. Assuming arguendo a prima facie case, the Company articulated a legitimate non-discriminatory reason for the suspension. It is clear that a rule was violated. In

all other instances where the rule was violated, the employees involved received three day suspensions, the same punishment meted out to Dailey. In addition, in each of those other instances, the other employees were white.

10. Once again, Dailey presented no evidence of pretext. Therefore, he has not demonstrated that he was suspended on account of his race.

11. Dailey also contends that the suspension was done in order to retaliate against him because he frequently complained about discrimination in the workplace. In order to raise a presumption of discrimination in a retaliation case, a plaintiff must show:

> (1) he participated in a statutorily protected activity;
>
> (2) was the object of adverse employment action; and
>
> (3) there is a causal nexus between the activity and the adverse action. *DeAnda v. St. Joseph Hosp.*, 671 F.2d 850 (5th Cir. 1982).

*Armstrong v. City of Dallas*, 997 F.2d 62, 65 n.3 (5th Cir. 1993).

12. Dailey repeatedly filed grievances alleging discrimination in the workplace. He was suspended for three days. Some of the individuals involved in making the suspension decision were aware of Dailey's complaints about discrimination.

13. The Company presented uncontroverted evidence that all employees who engage in similar behavior receive a three day suspension. The discipline Dailey

received was the same as that received by white employees who made abusive and derogatory statements in the workplace, whether or not they complained about discrimination. Since the discipline was consistent with that given to all other employees, the Company satisfied its burden to demonstrate the existence of a legitimate non-discriminatory reason for the suspension.

14. Dailey alleges that someone moved his tool box to "set him up", knowing that he would blow up and make profane racist remarks and receive discipline for that conduct. There is absolutely no evidence, however, to indicate this allegation is anything more than a subjective belief held by Dailey. While there is evidence that Dailey can be abusive and difficult to work with, there is no evidence of a "conspiracy" or a "setup". Dailey's claim that he was suspended as an act of retaliation is rejected.

15. Dailey's final claim is that in October of 1990 he was not allowed to return to work on account of his race and in retaliation for complaining of discrimination. While Dailey was suspended he went to his physician and received a note indicating he was not capable of working. Therefore, at the conclusion of his suspension, it was Dailey's own action which prevented him from returning to work.

16. In order to demonstrate a prima facie case of discrimination, Dailey must demonstrate that he was qualified to return to work after his suspension. He cannot carry that burden. The Court finds from the evidence that the Company accommodated Dailey by permitting him to choose those machines on which he would work so as to comply with his restrictions. Even when given

this freedom of choice, Dailey repeatedly contended that he could not do the work assigned. At one point, in order to demonstrate to Dailey that he was not being forced to exceed his restrictions, the Company conducted an ergonomic study which showed Dailey would not have to lift more than 14.92 pounds, which was within his restrictions. Yet, Dailey contended he could not work.

During and after his suspension, Dailey's physician repeatedly changed Dailey's restrictions, and usually told the Company that Dailey was not capable of performing any work. It was not until after Dailey had received a workers' compensation award that the physician gave Dailey one final permanent restriction, in October of 1992.

This conclusion that Dailey has not established a prima facie case is bolstered by the finding of the OFCCP which, after investigating complaints of race and handicap discrimination, concluded that the Company was not able to determine what Dailey was capable of doing. Therefore, there was no discrimination in not returning Dailey to work in October of 1990.

17. Even if Dailey could establish a prima facie case, the Company has carried its burden to demonstrate that it had a legitimate non-discriminatory reason for its decision not to return Dailey to work in October of 1990. The Company could not tell what Dailey was capable of doing. Despite its efforts to accommodate Dailey, Dailey always argued that it was not enough. Finally, Dailey's physician sent statements to the Company stating that

Dailey was not capable of performing any work. Therefore, the Company could not return Dailey to his B class machinist position.

18. Dailey has not offered any credible evidence to demonstrate that his race was the real reason that the Company failed to return him to work in October of 1990. When his suspension was over, Dailey was not capable of returning to work. In addition, at that time the Company explained to Dailey that it could not continue to accommodate him as it had in the past as his inability to perform his job fully and completely was impacting production. Dailey has presented no evidence to contradict any of this evidence. As with his other claims, Dailey's only support is his subjective belief that he was the victim of race discrimination, which is not sufficient.

Dailey also attempts to argue that there were a few racist comments made in the workplace and placed on union campaign literature. None of those comments were made to Dailey. The defacing of his campaign literature was not reported to management for four months. They were so remote in time with regard to the decision not to return Dailey to work so as not to allow a reasonable inference that the real reason Dailey was not returned was on account of race.

Dailey's burden is to demonstrate that but for his race he would have been returned to work in October of 1990. The Court finds and concludes from the evidence that he has failed in carrying his burden.

19. As with his suspension, Dailey has made out a prima facie case of retaliation, for the same reasons. However, the Court concludes that the same reasoning with

regard to the Company's legitimate non-discriminatory reason in response to the claim of race discrimination applies to the retaliation claim as well.

20. Absent proof that the Company intended to discriminate against him because of his race or as an act of retaliation, Dailey is not entitled to judgment. *See St. Mary's Honor Center*, 113 S.Ct. 2741 (1993). Dailey has not demonstrated that the Company's reasons were a pretext to retaliate against him.

21. Any finding of fact which is a conclusion of law, or vice versa, shall be so deemed.

Based upon the above findings of fact and conclusions of law, Plaintiff's suit is hereby dismissed in its entirety, with prejudice and Defendant is awarded all costs incurred herein.

SO ORDERED, this 6th day of January, 1995.

/S/

JOE KENDALL
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| OLLIE DAILEY, | § | |
| | § | |
| Plaintiff, | § | |
| | § | CIVIL ACTION NO. |
| v. | § | 3:94-CV-1214-X |
| | § | |
| VOUGHT AIRCRAFT CO., | § | |
| | § | |
| Defendant. | § | |

**MEMORANDUM OPINION AND ORDER**

(Filed March 8, 1996)

Now before the Court is the Defendant's Motion for Summary Judgment filed on July 31, 1995. Plaintiff's response was filed on November 27, 1995, after the Court granted two extensions. After consideration of the motion, response, reply, the pleadings on file and the applicable law, the Court is of the opinion that the motion should be, and is hereby, **GRANTED.** The Clerk of the Court is **ORDERED** to close this case and to provide all parties with notice of its dismissal.

**Factual Background**

This is an employment discrimination case. Plaintiff, an African-American, has worked off and on for the defendant as a class B machinist, since being hired in 1984. At various times, he has been laid off and recalled depending upon the defendant's work requirements and order volume. Plaintiff is currently working for defendant as a class B machinist with no working restrictions due to his alleged disability.

In January 1990, Dailey suffered an on-the-job injury which he claims resulted in a recognizable disability under the Americans with Disabilities Act. As a result of this injury, his doctor placed him on various work restrictions concerning the amount of weight he could lift. These restrictions varied frequently, hitting virtually every five-pound increment between five and fifty pounds. Plaintiff's doctor stated on various occasions that plaintiff would be unable to work at all. Plaintiff was also transferred back and forth from the first shift to the third shift several times. Defendant contends that these transfers were due to plaintiff's therapy schedule or otherwise related to his work restrictions, while plaintiff claims that at least one transfer was motivated by racial animus[1]. Eventually, plaintiff was laid off by the defendant. When he was not returned to work as quickly as he thought he should be, plaintiff filed the 1991 action.

Although, at the time, his physician had recently opined that he would not be able to return to work, plaintiff filed a complaint with the Office of Federal Contract Compliance Programs (OFCCP) alleging that he was not returned to work because of his handicap. Almost

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[1] The history of Mr. Dailey and his various claims against Vought Aircraft Company is a long and involved one. Dailey has asserted that almost all actions ever taken against him while he was employed with the company were a result of racial animus, retaliation, and/or disability discrimination. For a more detailed history of the factual scenarios involved in these various and sundry claims see 3: 91-CV-1327-X, *"Dailey I"* which was litigated in a five-day bench trial resulting in a dismissal of Dailey's Title VII claims and 3:94-CV-325-X, *"Dailey II"* which has been previously dismissed by this Court because it was based on identical facts and allegations as the 1991 action.

immediately after that filing, he filed an EEOC grievance based on the exact same facts, undaunted by the regulations which prohibit this. This Court dismissed without prejudice Dailey's ADA claims in order for the proper administrative avenues to be followed. Now, nearly five years down the road from the first action, this Court has been asked to adjudicate Dailey's ADA claims.

Plaintiff's final claim against the beleaguered defendant involves an alleged violation of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213. In this action, Dailey claims that the defendant's failure to return him to work in October 1992 was due to the company's discrimination of him on the basis of his alleged disability. The defendant moves for summary judgment based upon Dailey's inability to establish a prima facie case of discrimination under the ADA and, alternatively, Dailey's failure to overcome Vought's proffered legitimate non-discriminatory reason for its failure to return him to work in October 1992.

**Standard of Review**

The movant in a summary judgment context must show the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 170 (5th Cir. 1991). The existence of a genuine issue of material fact is determined based on whether a fair-minded jury could return a verdict for the plaintiff based on the evidence presented. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986). The rules allocating the burden of proof guide a court in a summary judgment analysis, *Fields v. City of S.*

*Houston*, 922 F.2d 1183, 1187 (5th Cir. 1991), and such allocation depends on the burden of proof that would obtain at trial. *See Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 150 (5th Cir. 1991). The nonmovant is not required to respond to the motion until the movant properly supports his motion with competent evidence. *Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1675 (1992). However, once the movant has carried his burden of proof, the nonmovant may not sit idly by and wait for trial. *Page v. DeLaune*, 837 F.2d 233, 239 (5th Cir. 1988). When a movant carries his initial burden, the burden then shifts to the nonmovant to show that the entry of summary judgment is inappropriate. *Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). Although the nonmovant may satisfy this burden by tendering depositions, affidavits and other competent evidence,[2] "[m]ere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 82 (1992). Although a court must "review the facts drawing all inferences most favorable to the party opposing the motion," *Rosado v. Deters*, ___ F.3d ___, No. 92-4109, 1993 WL 393601, at *2 (5th Cir. Oct. 22, 1993) (quoting *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986)), the nonmovant may not rest on mere allegations or denials in its pleadings; instead, "the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). However,

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[2] *See* FED. R. CIV. P. 56(e).

merely colorable evidence or evidence not significantly probative will not defeat a properly supported summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). The existence of a mere scintilla of evidence will not suffice. *Id.* at 252. When the nonmoving party fails to make the requisite showing and the moving party has met his summary judgment burden, the movant is entitled to summary judgment. FED. R. CIV. P. 56(c); *Campbell v. Sonat Offshore Drilling*, 979 F.2d 1115, 1119 (5th Cir. 1992).

**Discussion**

The ADA prohibits discrimination against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a); *see also Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995). The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8).

The legal standards applicable to discrimination cases contain a dance among shifting burdens of production. First, a plaintiff must establish a *prima facie* case, which gives rise to an inference of discrimination by showing that: (1) he or she suffers from a disability; (2) he or she is qualified for the job; (3) he or she was subject to

an adverse employment action; and (4) he or she was replaced by a non-disabled person or was treated less favorably than non-disabled employees. *See Norris v. Hart Marx Specialty Stores, Inc.*, 913 F.2d 253, 254 (5th Cir. 1990); *EEOC v. Brown & Root, Inc.*, 688 F.2d 338, 340-41 (5th Cir. 1982). These are the so-called "McDonnell Douglas" factors, after *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and they may be modified as necessary to conform to the facts of a particular case. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 (1976).

By establishing a *prima facie* case, the plaintiff creates a rebuttable presumption that the employer unlawfully discriminated against him. *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742, 2747 (1993). Next, the burden falls on the defendant to rebut the presumption by producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason. *Id; see also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). While an employer need not prove the legitimate reason, it must produce some evidence to support the assertion. *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 395 *citing St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2748 (1993). As the Supreme Court has emphasized, although the burden of production shifts to the defendant, the burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *St. Mary's* at 2747. If the employer produces any evidence "which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action," then the employer has satisfied its burden of production. *Id.* at 2748. The defendant's successfully carrying the burden of

production rebuts the *prima facie* case, which at that point drops from the case.[3] *Id.* The plaintiff then has the opportunity to put on evidence that the defendant's proffered reason was not the true one for the employment decision, but in order to show pretext, the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason. *Id.* at 2752 (emphasis in original).

*A. Does Dailey Suffer from a Disability as Defined by the ADA ?*

Although Dailey fails to present sufficient evidence on three of the four elements of a *prima facie* case of disability discrimination, failure to prove only one element will result in a summary judgment for the defendant. Accordingly, the Court will focus on Dailey's inability to prove that he is disabled as contemplated by the ADA and the regulations which interpret the statute.

The ADA forbids discrimination "against a qualified individual with a disability because of the disability of such individual. . . . " *Butcher v. Ingalls Shipbuilding,* 53 F.3d 723, 725 (5th Cir. 1995) *(quoting* 42 U.S.C. 12112(a)). The term "disability" as used in the ADA means:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

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[3] It is important to note that whether a defendant carries his burden of production involves no credibility assessment, "[f]or the burden-of-production determination necessarily *precedes* the credibility-assessment stage." *Saint Mary's Honor Ctr.,* 113 S.Ct. at 2748 (emphasis in Original). In other words, the Court is to take the defendant's rebuttal evidence as true. *Id.*

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. 12102(2)4.[4] The parties do not materially dispute the fact that Dailey has some type of physical impairment related to his back. However, "[a] physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA. The statute requires an impairment that substantially limits one or more major life activities. *Dutcher* at 726. The ADA defines neither "substantially limits" nor "major life activities," but the regulations promulgated by the EEOC under the ADA provide significant guidance. These regulations adopt the same definition of major life activities as used in the Rehabilitation Act. *Dutcher* at 726. *(citing Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir.1994), *cert. denied*, 115 S.Ct. 1104 (1995)). "Major life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. 1630.2(i). Whether an impairment "substantially limits[5]" a major life activity is determined in light of (1) the nature and severity of the

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[4] The Fifth circuit has noted that this definition of "disability" is substantially equivalent to that in the Rehabilitation Act, 29 U.S.C. § 701-797. *See Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995); *see also Chandler v. City of Dallas*, 2 F.3d 1385, 1391 n. 18 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1386 (1994).

[5] To substantially limit means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an Individual can perform a particular major life activity as compared to the

impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term impact. 29 C.F.R. § 1630, App., § 1630.2(j).

Based upon Dailey's affidavit, attached as an exhibit to his response of November 27, 1995, the relevant impairment for purposes of this suit, which addresses only his ADA claims, is the lifting restriction imposed by Dr. Morris of no more than twenty pounds. *See* Affidavit of Ollie Dailey at 2, ¶ 4. Exhibit M to the Pl's Rsp. If this restriction does not substantially limit a major life activity, defendant is entitled to summary judgment.

The Court first examines whether Dailey's impairment substantially limits a major life activity other than working. *See* 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630, App., ___, § 630.2(j) ("If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.") The Court has searched and scrutinized the summary judgment record before and it can find no scintilla of evidence that Dailey has appended or submitted which would support a conclusion that he is "substantially limited" with regard to a life activity other than working. The Court has examined the plaintiff's affidavit and the various letters from doctors which were included in the response and can find no

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condition, manner, or duration under which the average person in the general population can perform the same major life activity. 29 C.F.R. § 1630.2(j)(1)(i), (ii).

summary judgment evidence at all of a substantial limitation caused by his twenty-pound lifting restriction. The Court does not even find that Dailey makes an inadmissible conclusory statement that other life activities are affected. Dailey has offered no evidence on which a jury could find that this impairment substantially limited a major life activity.

Having found that Dailey has failed to present summary judgment evidence of a substantial limitation on a major life activity other than working, the Court turns to Dailey's ability to demonstrate that the twenty-pound lifting restriction affects the major life activity of working. In addressing a question of whether an impairment substantially impairs the activity of working, the Fifth Circuit has held that:

> [S]ubstantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

*Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995). The Court has reviewed all of the admissible documentation and the affidavit of Ollie Dailey submitted by the plaintiff in support of his response to the motion for summary judgment and finds that Dailey presents no evidence that his twenty-pound lifting restriction prevents him from performing an entire class of jobs or a broad range of jobs. Although the nonmovant may satisfy his burden by tendering depositions, affidavits and other

competent evidence,[6] "[m]ere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 82 (1992).

Mr. Dailey has returned to Vought and has been working since May 1995. Ollie Dailey Affidavit at ¶ 5; P.P. Montez Affidavit at ¶ 9. The Fifth Circuit has held that the inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation. *Dutcher* at 727. In Dailey's case, his lifting limitation prevents him from doing one aspect of the Class B machinist's job, lifting items over twenty pounds,[7] this is a single aspect of the job and does not show that he is unable to perform the work

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[6] *See* FED. R. CIV. P. 56(e).

[7] The Court, while addressing the ADA claim on its own merits, is not required to ignore completely Dailey's past history. His personal physician's previous lifting limitations have run the gamut from no work at all to an ability to lift as much as fifty pounds. The limitations which Dailey presented to his employer hit almost every five-pound increment in between those levels and sometimes more than once. To say his restrictions fluctuated is an understatement. While this information certainly puts his injury in perspective, for purposes of this motion, and only for the purposes of this motion, the Court will accept Dailey's own statement of his lifting limitation contained in his submitted affidavit. Accordingly, the Court addresses only the twenty-pound restriction in this motion. The Court cautions Mr. Dailey and his attorney that any future claim based upon the same injury, but with a "new," lower lifting restriction will be looked upon with disfavor and result in the almost certain proposition of sanctions.

generally.[8] "An impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one." *Id.*

In its research, the Court has found several cases with facts which are similar to the action at hand. While no Fifth Circuit case has ruled directly on lifting limitations as a disability, the Court finds *Dutcher* and cases from other circuits persuasive. The circumstances present in one such case, *Lowe v. Angelo's Italian Foods*, 1994 WL 675027 (D. Kan. Nov. 18, 1994), relate closely to plaintiff's claimed impairment. Indeed the plaintiff in *Lowe* had

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[8] The Fifth Circuit has also held that three additional factors can be considered when determining whether an impairment substantially limits the major life activity of working. Those five are:

> (A) The geographical area to which the individual has reasonable access;
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> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (Class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

*Dutcher* at 727 *citing* 29 C.F.R. 1630.2(j)(3)(ii)(A)-(C). Dailey provided no such evidence in opposing Vought's summary judgment motion.

even greater restrictions than Dailey alleges. In *Lowe*, the plaintiff had a lifting restriction of no greater than fifteen pounds and only on an occasional basis. The plaintiff also was restricted from doing much stooping or bending. Although these limitations precluded the plaintiff from performing her former position, the court found, as a matter of law, that these limitations did not substantially limit a major life activity. *Id.* at 4-5. Other cases in which lifting restrictions were at issue on motions for summary judgment include *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994) (an employee who stated that he could perform any job that did not require overhead lifting in excess of fifty to seventy pounds failed to establish that he was disabled within the meaning of the ADA), *cert. denied*, 115 S.Ct. 1104 (1995); *O'Dell v. Altec Industries, Inc.*, 1995 WL 611341 (W.D. Mo. Oct. 16, 1995) (permanent work restrictions of lifting 35 lbs. maximum with frequent lifting and/or carrying of objects weighing up to 20 lbs insufficient to establish plaintiff was disabled under the ADA); *Czopek v. General Electric Company*, 1995 WL 374036 (N.D. Ill. June 21, 1995) (twenty pound lifting restriction did not render an employee disabled for purposes of the ADA); *Hutchinson v. United Parcel Serv*, 883 F. Supp. 379 (N.D. Iowa 1995) (seventy pound lifting restriction insufficient); *Otis v. Canadian Valley-Reeves Meat Co.*, 884 F. Supp. 446 (W.D. Okla. 1994) (temporary lifting restriction of twenty-five pounds and permanent restriction of seventy pounds did not qualify plaintiff as a disabled person under the ADA), *aff'd*, 52 F.3d 338 (10th Cir. 1995); *Aucutt v. Six Flags over Mid-America*, 869 F. Supp. at 744 (E.D. Mo. 1994) twenty-five pound lifting restriction not disabling). The key in each of these decisions was the plaintiff's failure to

demonstrate an inability to perform a class of jobs or a broad range of jobs in various classes. *Bolt on v. Scrivner, Inc.*, 36 F.3d at 944; *Czopek v. General Electric Company*, 1995 WL 374036, at 2; *Otis v. Canadian Valley-Reeves Meat Co.*, 884 F. Supp. at 449; *Hutchinson v. United Parcel Serv*, 883 F. Supp. at 396; *Aucutt v. Six Flags over Mid-America*, 869 F. Supp. at 744.

Despite his conclusory statements that he is disabled, plaintiff has not shown that he is unable to engage in a class of jobs or in a broad range of jobs in various classes, nor has he established any limitations outside of the work setting. The Court concludes that Dailey failed to provide summary judgment evidence that his impairment substantially limits any major life activity.[9] Defendant Vought Aircraft is entitled to a summary judgment on Dailey's ADA claim on this basis alone. Additionally,

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[9] The ADA also provides an avenue for a plaintiff to complain that she had a record of such an impairment that substantially limits a major life activity. 42 U.S.C. 12102 (2)(B). There is also a claim under the ADA that a plaintiff was discriminated against on the basis that she had a "history of, or had been Misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2 (k). None of these claims are presented for determination in this case. Plaintiff is only complaining that he actually had a physical impairment that substantially impaired the major life activity of working. He is not complaining that Vought mistakenly regarded him as having such a disability or that he had a history of such a disability. These claims could have been brought in this lawsuit had Dailey included them in his petition. However, he did not and as such this memorandum opinion and order will preclude future claims based on those theories which rely upon the same facts as the ones now before this court.

Dailey offers no summary judgment evidence to controvert Vought's evidence that it was experiencing a paucity of work within Dailey's position which resulted in its refusal to allow him back to work, as well as causing the layoff of other B class machinists. *See* Affidavit of P.P. Montez. Accordingly, the Court finds that Vought took no action against Dailey based upon his impairment.

**Conclusion**

Based upon the above discussion, the Court finds that the defendant, Vought Aircraft Company, is entitled to summary judgment on Dailey's ADA claim. Accordingly, Dailey's claims are **DISMISSED with PREJUDICE.** The Clerk of the Court is **ORDERED** to close this case and to provide all parties with notice of its dismissal.

**SO ORDERED.**

March 8, 1996.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| **OLLIE DAILEY,** | * | |
| | * | |
| **Plaintiff,** | * | **CIVIL ACTION NO.** |
| **VS.** | * | **3:94-CV-1214-X** |
| | * | |
| **VOUGHT AIRCRAFT COMPANY,** | * | |
| | * | |
| | * | |
| **Defendant.** | * | |
| | * | |

**NOTICE OF APPEAL**

(Filed March 18, 1996)

Notice is hereby given the Ollie Dailey, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgment and Memorandum Opinion and Order entered on March 11, 1996.

Respectfully submitted,

Noemi A. Collie, Esq.
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Dallas, Texas 75208
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(214) 942-6818 (fax)
/s/ Noemi A. Collie
Noemi A. Collie, Esq.
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## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was mailed via regular mail to opposing counsel, Maureen Moore, TRUE ROHDE & SEWELL, 8080 N. Central Expressway, 9th Floor, Dallas, Texas 75206 on March 18, 1996.

/s/ Noemi A. Collie
Noemi A. Collie, Esq.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| OLLIE DAILEY,<br>Plaintiff,<br>v.<br>INT'L UNION, UNITED AEROSPACE WORKERS, LOCAL 848,<br>Defendant. | § | CASE NO. 3:96-CV-1025-X |
| OLLIE DAILEY,<br>Plaintiff,<br>v.<br>VOUGHT AIRCRAFT COMPANY,<br>Defendant. | § | CASE NO. 3:94-CV-1214-X |

**ORDER**

(Filed July 18, 1996)

In January of 1995, this Court entered sanctions against Ollie Dailey[1], plaintiff in this action, and his attorney, Noemi Collie. Those sanctions were stayed pending Dailey's appeal of his other actions[2]. The Court has been notified by the Fifth Circuit that both of those

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[1] *See Ollie Dailey v. Vought Aircraft Co.*, 3:94-CV-1214-X

[2] *See Ollie Dailey v. Vought Aircraft Co.*, 3:91-CV-1327-X and *Ollie Dailey v. Vought Aircraft Co.*, 3:94-CV-325-X

appeals have been resolved in the defendant's favor and the Court's opinion and judgment were affirmed in all respects.[3] On June 18, 1996, this Court ordered plaintiff and his counsel to pay the imposed sanctions within eleven (11) days of the date of that order. The date for payment of the sanctions was June 29, 1996. Since that date fell on a Saturday, plaintiff and his counsel had until Monday July 1, 1996 to pay the sanctions. As of the date of this Order, no payments has been received by the defendant for the attorney's fees that this Court entered as sanctions. Additionally, the Court has received no correspondence regarding the sanctions, no request for extension and no explanation for the willful failure to adhere to this Court's orders.

Consequently, this Court finds that it has no choice but to employ further measures in order to enforce the lawful orders of the Court. If parties and attorneys before this Court were allowed to wilfully ignore the orders of this Court, Rule 11 and the practices and procedures of the Court would be meaningless.

This Court initially granted a stay of the sanctions pending appeal. In his motion for a stay plaintiff initially represented that he had no funds to pay the sanctions. In anticipation of this same argument, the Court reminds the plaintiff that a lack of funds to pay a sanction is not in itself a reason to allow a litigant who is under sanction to file pleadings. *See Gelabert v. Lynaugh*, 894 F.2d 746, 748 (5th Cir. 1990). After careful consideration, the Court

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[3] *See Ollie Dailey v. Vought Aircraft Co.*, Dk. No. 95-10437; Judgment of the Fifth Circuit Court of Appeals Issued as Mandate on June 25, 1996.

finds that the conduct of the plaintiff and his wilful disregard of this Court's sanctions order necessitates that Plaintiff's case, 3:96-CV-1065-X (*"Dailey IV"*), must be **DISMISSED** for his failure to pay the court-imposed sanctions entered in his previous actions. The Court determines that this is the most lenient action that can be taken in order to prevent this conduct in the future on the part of this litigant or future litigants.

Accordingly, the Clerk of the Court is **ORDERED** to close this case and to provide all parties with notice of its dismissal. The Clerk of the Court is **FURTHER ORDERED** to place plaintiff's name on the sanctions list in the Northern District of Texas. Ollie Dailey may not file any pleadings or future actions without leave of this Court until the sanctions have been paid in full. If Dailey attempts to file any pleading or document in the Northern District, the Clerk of the Court is to return that document without filing it unless the Court provides instructions to the contrary.

The sanctions entered in *Dailey III* were entered against plaintiff and his attorney jointly and severally. Therefore, Noemi Collie is equally responsible for payment of the sanctions. As an attorney, Ms. Collie is held to a higher standard than her client and as such her blatant and wilful disregard of this Court's sanctions order is even more troublesome. After careful consideration, the Court determines that in order to enforce its lawful orders, it is necessary to bar Noemi Collie from practice in the Northern District until such time as the sanctions imposed in *Dailey III* have been paid in full. Consequently, Noemi Collie is **ORDERED** to provide a copy of this order to all of the district judges in the

Northern District of Texas. Noemi Collie is also **ORDERED** to provide a copy of this order to all parties whom she currently represents in the Northern District and to all opposing counsel on any cases currently pending in the Northern District. After Collie has delivered a copy of this order to all the above individuals, Collie shall mail to this Court a letter stating that she has complied with this order and provide the Court with a list of all served parties. Collie shall provide the above individuals with notice of this Order on or before **July 31st, 1996**. Within five days after Collie has served the above individuals, she shall forward the required letter to the Court.

Noemi Collie is **FURTHER ORDERED** to comply with Local Rule 13.2(c). The Clerk of the Court is **ORDERED** to return unfiled any motion, pleading, paper or document with the exception of a motion to withdraw or a motion to substitute counsel which Noemi Collie may attempt to file until further order of this Court. Upon payment of the sanctions and notification of such payment to the Court by defendant's cousel, Ms. Maureen Moore, Ms. Collie may resume practice in the Northern District.

**SO ORDERED.**

Dated: July 18, 1996.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT
JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| OLLIE DAILEY,<br>Plaintiff,<br>v.<br>VOUGHT AIRCRAFT CO.,<br>Defendant. | § | CASE NO. 3:94-CV-1214-X |
| OLLIE DAILEY,<br>Plaintiff,<br>v.<br>INT'L UNION, UNITED AEROSPACE WORKERS, LOCAL 848,<br>Defendant. | § | CASE NO. 3:96-CV-1025-X |

**ORDER**

(Filed Aug. 27, 1996)

Now before the Court is the Plaintiff's Motion for Reconsideration and/or Stay of June 18, 1996 and July 18, 1996 Orders and Brief in Support Thereof filed on July 29, 1996. After consideration of the motion and response, the Court determines that the motion should be, and is hereby, **DENIED**. With regard to Ollie Dailey's Motion for Reconsideration, the motion is **DENIED** in its entirety. With regard to Noemi Collie's Motion for Reconsideration, the Court **ORDERS** the following modifications to the July 18, 1996 Order:

The suspension pending full payment of the sanctions imposed in *Ollie Dailey v. Vought Aircraft, Co.*, 3:94-CV-1214-X is modified to the extent that Ms. Collie may participate and file documents in the following cases which are currently set for trial:

| | | |
|---|---|---|
| 1) 3:92-CV-1676 | *Pogue v. City of Dallas* | Judge Urbom |
| 2) 3:94-CV-2185-D | *Stephens v. DISD* | Judge Fitzwater |
| 3) 3:95-CV-714-R | *Brookman v. Parkland Hosp.* | Chief Judge Buchmeyer |
| 4) 3:95-CV-1919-H | *Mallery v. City of Dallas* | Judge Sanders |
| 5) 3:95-CV-2747-G | *Mauldlin v. Fiesta Mart* | Judge Fish |

In fairness to the litigants, for the convenience of the presiding judges of the Northern District of Texas, and to encourage the orderly resolution of these pending matters, Ms. Collie may continue to handle these cases until their resolution, subject to the approval of the presiding judge and subject to the application of her share of any funded settlement agreement or collected judgment in these cases to the sanctions imposed in *Ollie Dailey v. Vought Aircraft, Co.*, 3:94-CV-1214-X.

The July 18, 1996 Order is only modified as to the above cases. The other provisions of that Order remain in full force and effect and Ms. Collie must comply with them without further delay. The Court is aware that Ms. Collie has not provided her clients, opposing counsel or the judges of the Northern District with copies of the July 18, 1996 Order. Ms. Collie will do so as soon as practicable upon receipt of this Order. Unless Ms. Collie is in

receipt of a written order staying this Court's July 18, 1996 Order, she must comply with the Order. As of this date, no such order has been entered. At this point in time, the Court will not impose further sanctions or hold a show cause hearing for contempt of court regarding the failure to follow the July 18, 1996 orders of this Court. However, if Ms. Collie has not provided this Court with documentation of her compliance with the notice provision of the July 18, 1996 Order by **3 p.m. on Monday, September 9, 1996**, the Court will take further action. Ms. Collie shall attach a copy of this Order along with the July 18, 1996 Order.

Ms. Collie and/or Ollie Dailey must pay the sanctions imposed in *Ollie Dailey v. Vought Aircraft, Co.*, 3:94-CV-1214-X. Noemi Collie will not be permitted to appear in any other case other than the five cases listed above and she will not be allowed to file any new cases in the Northern District until those sanctions are paid. Ollie Dailey will not be allowed to file any other cases in the Northern District of Texas until the sanctions are paid.

**SO ORDERED**

Dated: August 27th, 1996.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| OLLIE DAILEY,<br>Plaintiff,<br>v.<br>VOUGHT AIRCRAFT CO.,<br>Defendant. | §<br>§<br>§<br>§<br>§<br>§<br>§ | CASE NO. 3:94-CV-1214-X |
| OLLIE DAILEY,<br>Plaintiff,<br>v.<br>INT'L UNION, UNITED AEROSPACE WORKERS, LOCAL 848,<br>Defendant. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CASE NO. 3:96-CV-1025-X |

**ORDER AMENDING ORDER**
**ON MOTION FOR RECONSIDERATION**

(Filed Sept. 9, 1996)

On August 27, 1996, the Court entered an order amending its original order of sanctions issued on July 18, 1996. In that Order, the Court listed five cases which were currently set for trial which Ms. Collie would be allowed to participate in despite her suspension pending payment of monetary sanctions. The Court has discovered that a case pending before Judge Sanders was inadvertently left off the list. Consequently, that Order is

amended to allow Ms. Collie to participate in the following case, 3:96-CV-1372-H, *Mary F. Adegoke v. Ogden Aviation Service Company of Texas, Inc.*

The conditions which applied to the August 27, 1996 Order apply equally to the case listed above. In fairness to the litigants, for the convenience of the presiding judges of the Northern District of Texas, and to encourage the orderly resolution of that matter, Ms. Collie may continue to handle the case until its resolution, subject to the approval of the presiding judge and subject to the application of her share of any funded settlement agreement or collected judgment to the sanctions imposed in *Ollie Dailey v. Vought Aircraft, Co.*, 3:94-CV-1214-X.

Ms. Collie and/or Ollie Dailey must pay the sanctions imposed in *Ollie Dailey v. Vought Aircraft, Co.*, 3:94-CV-1214-X. Noemi Collie will not be permitted to appear in any other case other than the cases previously listed by the Court and she will not be allowed to file any new cases in the Northern District until those sanctions are paid.

**SO ORDERED**

Dated: September 9, 1996.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| OLLIE DAILEY,<br><br>Plaintiff,<br><br>V.<br><br>INT'L UNION, UNITED AEROSPACE WORKERS, LOCAL 848, AND LTV AEROSPACE AND DEFENSE COMPANY<br><br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION<br>NO. 3:96-CV-1025-X |
| OLLIE DAILEY,<br><br>Plaintiff,<br><br>V.<br><br>VOUGHT AIRCRAFT CO.,<br><br>Defendant. | §<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION<br>NO. 3:94-CV-1214-X |

**NOTIFICATION OF PAYMENT OF SANCTIONS**

NOW INTO COURT comes Maureen F. Moore, Defendant's counsel in the above entitled matters, and pursuant to this Court's July 18, 1996 Order, states as follows:

1. On September 23, 1996, Ms. Noemi Collie sent to me a check payable to Vought Aircraft Company (hereinafter "Vought") in the amount of $8,400.00 and a money order in the amount of $80.00 in payment of the sanctions

entered against Ms. Collie and her client Ollie Dailey on January 6, 1995.

2. Ms. Collie informed my office the afternoon of October 3, 1996 that the check had cleared on September 27, 1996.

3. Despite making calls to its bank, Vought has not received confirmation that the check has cleared. However, this afternoon Ms. Collie gave me permission to contact Schwab One, on which the check was drawn, and allowed them to release to me the fact that the check did clear on September 27.

Respectfully submitted,

/s/ _____

Maureen F. Moore
State Bar No. 14360475
McKENNA & CUNEO, L.L.P.
5700 Bank One Center
1717 Main Street
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Telephone: (214) 746-5700
Telecopier: (214) 746-5757

COUNSEL FOR DEFENDANT
VOUGHT AIRCRAFT COMPANY

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notification of Payment of Sanctions has been served via fax and via United States mail, certified, return receipt requested, on counsel for Appellant, Noemi A. Collie, 434 W. 12th Street, Dallas, Texas 75208, this 4th day of October, 1996.

/s/ _____
Maureen F. Moore

Supreme Court, U.S.
FILED
OCT 31 1996
CLERK

(3)

No. 96-391

In The
# Supreme Court of the United States
October Term, 1996

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**OLLIE DAILEY,**
**Petitioner,**

**VS.**

**LTV AEROSPACE AND DEFENSE COMPANY,**
**Respondent.**

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**OLLIE DAILEY,**
**Petitioner,**

**VS.**

**VOUGHT AIRCRAFT COMPANY,**
**Respondent.**

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**On Petition For Writ Of Certiorari**
**To The United States Court of Appeals**
**For The Fifth Circuit**

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## REPLY TO OPPOSITION TO PETITION

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**Noemi A. Collie, Esq.**
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**Dallas, Texas 75208**
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**Counsel for Appellant**

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## REPLY BRIEF TO OPPOSITION TO PETITION

## COUNTER STATEMENT OF THE FACTS

1. Dailey has never alleged he filed a charge of disability discrimination with the EEOC after he was not returned to work in October of 1990 as alleged by Respondent. Opposition to Petition at 9. Dailey has argued that he was being discriminated against and retaliated against because of his race and for his having engaged in protected activities, and that his disability or lifting restrictions, were being used as an excuse or pretext for that discrimination.

2. It is true Dailey did not complain about the campaign literature which had been defaced with the word "nigger" until four months after they were discovered. However, during trial Dailey specifically testified that he had taken this campaign literature along with some newly defaced literature which contained derogatory comments, although not racist comments, with him when he went to talk to Mr. Skinner. Dailey specifically testified that it was during this meeting with Mr. Skinner over these issues when he made the wholly inappropriate and out of context comments about interracial marriages. None of these facts was ever disputed.

3. The District Court did try to limit the case to two days, and acknowledged this fact as set out in the transcript (*Dailey I*, T. V. 1, p. 97) when informing the parties he would no longer restrict them in such a manner. Dailey has appealed the validity of the District Court's rulings and argued they are contrary to clear law and were intended to prevent him from reaching a jury. Any evidence which would tend to support his claims that the District Court violated the law and abused its discretion should be relevant to this Court's consideration of the issues on appeal.

4. Dailey and his counsel both contend there were statements made by the District Court during trial which were on the record and which did not appear in the transcript, so to the extent Respondent argues that there is no evidence in the record the District Court implied Dailey was being

"greedy" in his negotiations and threatened him with years of appeals if he did not settle his case, the Respondent is technically correct. However, it should be noted Respondent does not dispute the District Court suggested Dailey might be "greedy" when trying to convince him to settle his case and that this statement for some reason is not in the transcript.[1] As for the remaining statements about it being better to settle then face years of appeals, Dailey and his counsel continue to claim statements to this effect were made on the record in open court, should have been in the transcript and are indicative of bias on the part of the District Court.

5. It is true there is no evidence in the record that $100,000.00 offer was made by Respondent in this case during trial, except for the Respondent's failure to deny the fact in its Brief in Opposition. This fact is not being included by Dailey to prove liability for or invalidity of the claim or its amount. These would be the only circumstances under which this information would not be admissible under Rule 408 of the Federal Rules of Civil Procedure. If the information about negotiations is being offered for another purpose it can be admissible. Rule 408. The amount offered during trial is being presented by Dailey to put the District Court's comments about Dailey being greedy in full context and in defense of the claim that Dailey and his counsel have acted in bad faith at any time during the course of these proceedings. It is argued that $100,000.00 offers are not regularly made in the middle of trial in a case which is frivolous and brought in bad faith as Dailey has been accused of doing.

6. Contrary to Respondent's denial, the District Court very clearly found that Dailey's Title VII layoff claims brought in *Dailey II* were duplicative of the claims asserted in

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1 Dailey and his counsel have been unable to obtain any cooperation from the court reporter involved and have been forced to file a formal complaint against her with the Texas Board of Certification in order to find out what happened and why. Said complaint is pending.

*Dailey I*. Petition at 21a-22a. The District Court also found in its order granting sanctions that "there is no factual or evidentiary support for Dailey's claim that he was laid off either in retaliation for having filed previous discrimination claims, or that he was laid off on account of his race, which is different from any evidence submitted in those claims in *Dailey I*" which it had decided did not prove discrimination. Petition at 27a. Dailey had argued in defense of Respondent's motion for sanctions that he had relied on the same facts presented at trial during *Dailey I* as support for his layoff claims, as well as, the timing between the Department of Labor's order to Respondent that it had to return him to work and the decision to lay him and a few other machinists off. Dailey also relied on the fact that the decision to have the layoff was made by no other then Mr. Skinner. Dailey argued that if a jury believed he had been initially kept off work because of his race and in retaliation for his having engaged in protected activities back in 1990 then they could conclude from that, and the timing between the decision to lay him off and the Department of Labor's order to put him back to work, that the layoff was timed simply as a means to continue avoiding having to put him back to work and that it was motivated by the same discriminatory and retaliatory motives fueling the original October, 1990 refusal to return him to work. Additionally, evidence was produced to the District Court in the form of a letter wherein the Department of Labor references a meeting held with Respondent on May 20, 1993, the same day as the decision to lay Dailey off, during which time Respondent was informed that it must return Dailey to work, make him whole, and that it had no right to appeal. (*Dailey II*, R. Vol. 2, p. 282).

## ARGUMENT

### A. THE DISTRICT COURT DEPRIVED DAILEY OF A CONSTITUTIONAL RIGHT TO A JURY TRIAL BY ERRONEOUSLY SPLITTING HIS LEGAL AND EQUITABLE CLAIMS.

**1. The October, 1992 Title VII Claim.**

Dailey does not argue that he should be allowed to continue asserting new and different causes of action up to the time of trial at his whim as argued by Respondent. Dailey has argued, however, simply that his claims of race discrimination and retaliation over the Respondent's second refusal to return him to work in October, 1992 should not have been dismissed on the sole ground that these claims were not first raised in a timely EEOC charge. When Dailey first joined this claim he already had pending before the District Court in *Dailey I* his claim of a pattern and practice of race discrimination and retaliation culminating in Respondent's refusal to return him to work in October, 1990. The October, 1992 incident was alleged to have been a newly repeated identical act of discrimination and retaliation within this continuing pattern, as well as, retaliation over the previously filed EEOC charges and the litigation already pending before the District Court. This charge was not new and different.

Events arising after the original EEOC charge filing can be sued upon despite their not being included in the original charge if they are construed as events in the course of a continuing violation encompassed by the original charge. *Silver v. Mohasco Corp.* 602 F.2d 1083, 1090 (2nd Cir. 1979), *reversed on other grounds*, 447 U.S. 807, 65 L.Ed.2d 532, 100 S.Ct. 2486; *see also Brown v. Hartshorne Public School Dist. No. 1,* 864 F.2d 680, 682 (10th Cir. 1988)(a teacher was allowed to litigate a claim of hiring discrimination that arose after she filed her EEOC charge contesting her rejection in a prior year, based on her allegation that the post-charge rejection was part of an ongoing pattern of discrimination encompassing rejections in ten consecutive years); *Price v. Cannon Mills*, 113 FRD 66 (MD NC 1986). The refusal to return Dailey to work in October, 1992 was merely a repeat of the same event already within the alleged continuing violation encompassed in his earlier charges and then pending lawsuit. Additionally, the Fifth Circuit has held

that it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge because the District Court has ancillary jurisdiction. *Gottlieb v. Tulane Univ.*, 809 F.2d 278, 284 (5th Cir. 1987); *Gupta v. East Texas State University*, 654 F.2d 411, 413 (5th Cir. 1981); *see also Kirkland v. Buffalo Bd. of Educ.*, 622 F.2d 1066, 1068 (2nd Cir. 1980); *Nealon v. Stone*, 921 F.2d 584, 590 (4th Cir. 1992); *Malhortra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989). Not only was the second refusal to return Dailey to work like or reasonably related to the allegations in his earlier charge, but he had alleged they were retaliatory in the sense they grew out of the earlier charges. Under these circumstances there should have been no requirement whatsoever that Dailey file with the EEOC before pursuing his Title VII claims over the October, 1992 refusal to return him to work. As such, any finding by the lower courts that Dailey could not bring his Title VII claims of discrimination and retaliation over the October, 1992 incident because he failed to timely file an administrative charge with the EEOC was in error as a matter of law.

Respondent argues that Dailey's October, 1992 race discrimination and retaliation claim was a new and discrete act of discrimination requiring him to file an EEOC charge before bringing it in court. Opposition to Petition at 12. None of the cases cited by Respondent involved a case such as the instant case where the act of discrimination being considered had already been raised in a previous EEOC charge and was pending before the court when a second instance of the same act occurred. In those cases the instance of failure to rehire or reinstate was in fact a separate and distinct action rather then a repetition of the same act already raised in a charge and pending before the court as part of an alleged continuing pattern and practice. *See Ray v. Freeman*, 626 F.2d 439 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *Woodburn v. LTV Aerospace Corp.*, 531 F.2d 750 (5th Cir. 1976); *Redd v. Fisher Controls*, 814 F. Supp. 547 (W.D. Tex. 1992), *aff'd*

35 F.3d 561 (5th Cir. 1994). In the instant case, Dailey was complaining about a second instance of refusal to return him to work, and as he has already pointed out, the District Court had ancillary power to hear a repeated instance of allegedly discriminatory and retaliatory conduct already being considered by him as part of a continuing violation allegation. *See Gottlieb; Gupta, Brown, Malhotra,* and *Nealon, supra.* As such, the dismissal of this claim because Dailey had failed to file an EEOC complaint over this specific incident was in error as a matter of law.

Even if Dailey is incorrect in his argument that his October, 1992 race discrimination and retaliation claims should not have been dismissed for his failure to file a timely charge with the EEOC, he has argued in the alternative, that his timely filing of a charge with the Department of Labor, which included not only claims under the Rehabilitation Act of 1973 but also claims of race discrimination and retaliation over the October, 1992 act, was sufficient and timely filing for Title VII purposes. When two agencies have concurrent jurisdiction over the respondent involved and the subject matter of the charge, the EEOC considers the charge filed as of the date of whichever charge was filed first. EEOC Decision No. 71-1115 (1971) CCH EEOC Dec. para. 6201. Additionally, when it is because of bureaucratic ineptitude that the EEOC did not receive a charge within the statutory time limits, but the Department of Labor did, the charge is deemed to have been timely filed by the EEOC. *EEOC v. Delaware Trust Co.*, 416 F.Supp. 1040, 1046 (DC Del. 1976). Dailey argued that it was the Department of Labor's fault if the EEOC was not timely notified he was claiming race discrimination and retaliation over the October, 1992 refusal to return him to work. According to the procedures which are supposed to be followed by the Department of Labor it is suppose to refer to the EEOC any charge filed under the ADA in its entirety whenever it includes allegations of discrimination of an individual nature on the basis of race

unless it also includes allegations of a violation of the affirmative action requirements under Section 503. 41 CFR Part 60-742.5(a)-(e). Even when an affirmative action violation is made, the Department of Labor is suppose to bifurcate the charges and refer the race issues to the EEOC. 41 C.F.R. Part 60-742(a)-(e). Since Dailey's claims as filed with the Department of Labor on November 12, 1992 did not include allegations that the affirmative action requirements of Section 503 had been violated and they did include individual allegations of race discrimination and retaliation over the October, 1992 incident, the Department of Labor was suppose to notify the EEOC that these charges had been filed and to refer all the claims in their entirety to the EEOC, but it did not do this. Instead it did nothing with the race discrimination and retaliation claims and investigated instead only Dailey's Section 503 and ADA claims. Thus, any failure to timely file with the EEOC was not Dailey's fault, but that of the Department of Labor by its failure to follow its own administrative rules and regulations requiring it to notify the EEOC, and should not be held against him. *See Brown v. Crowe*, 963 F.2d 895, 898 (6th Cir. 1992). Whatismore, the pendency of proceedings in another federal agency will serve to toll the Title VII charge-filing time limit. *See Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529, 532 (SD Tex. 1972), *aff'd in part and revd in part*, 498 F.2d 641 (5th Cir) and *Egelston v. State University College*, 535 F.2d 752, 755, n. 4 (2nd Cir. 1976). The Department of Labor did not issue their notice of failure to conciliate on these charges until March 8, 1994. When Dailey was forced back to the EEOC to further conciliate his ADA claims over the same incident, the Department of Labor on Dailey's request finally referred the race discrimination claims to the EEOC and a right to sue letter was issued on both the ADA and Title VII claims arising out of the October, 1992 incident.

Thus, since Dailey did not have to file an EEOC charge alleging race discrimination and retaliation over the

October, 1992 refusal to return him to work, and if he did, he had done so by timely filing a charge with the Department of Labor raising the same claims, the District Court was in error as a matter of law in dismissing these claims from *Dailey I* and thereafter denying Dailey a jury trial in *Dailey I* on the ground that there were no post Civil Rights Act of 1991 claims before it. It can not be said the Fifth Circuit correctly affirmed the District Court's decision based upon its own precedent and precedent from other circuits, since the Fifth Circuit failed to cite any law whatsoever in support of its decision and failed to give any explanation as to why the law, including Fifth Circuit law, cited by Dailey was not applicable in the instant case. In fact the Fifth Circuit failed to address any of Dailey's arguments on appeal. The Fifth Circuit has affirmed a decision which is directly in conflict not only with its own law, but that of other circuits, and which has the end result of depriving Dailey of his constitutional right to a jury trial. Accordingly, there is a basis for this Court to assert its power of supervision.

**2. The July, 1993 Layoff Claims**

In the case of Dailey's July, 1993 Title VII and ADA claims, he had alleged that he was laid off simply to avoid having to return him to work in furtherance of the original discriminatory and retaliatory act of refusing to allow him to return to work and in retaliation for his haveing brought his previous EEOC and Department of Labor charges and pending litigation. Dailey contends the District Court's refusal to allow him to join these claims was in error as a matter of law since has already been argued a claim of retaliation growing out of a charge already pending before the Court need not be filed with the EEOC first. In that regard, the District Court's decision not to allow these charges in *Dailey I* was both in error as a matter of law, as well as, an abuse of descretion.

The July, 1993 layoff was instigated by the discriminating Mr. Skinner the same day the Department of

Labor ordered the Respondent to return him to work and to make him whole. This was on May 20, 1993. Dailey was notified on May 23, 1996 of the impending layoff. Although not aware of the exact timing of these events at the time of filing, Dailey was aware of the findings of the Department of Labor and its negotiations with Respondent, and relying on this timing and the evidence he had of earlier discrimination, Dailey immediately attempted to join these issues without leave of court on May 28, 1993; the last day to amend per the scheduling order. Realizing his error in filing without leave, Dailey sought leave to amend his complaint some 20 days later. This motion to amend was filed in early June, 1993 which was 15 days prior to the discovery deadline, more then six months before the scheduled trial date, a little over a month before the layoff would even become effective, and only 35 days after the decision to lay Dailey off had been made. There is absolutely no basis whatsoever for Respondent to argue Dailey's first motion seeking to join the 1993 layoff claims was untimely under these circumstances. If anything it was the District Court that was untimely in responding to the motion to amend since it did not rule on this motion until November 4, 1993. At that time it was determined that the claims were too remote in time[2] from the allegations currently involved in the case and that Dailey had failed to satisfy the administrative prerequisites of filing an EEOC charge over the layoff.

Dailey timely returned to the EEOC, filed his charge, obtained a right to sue letter, and returned to the District

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2 Dailey disputes the layoff is too remote from the claims then pending before the District Court especially when you consider the timing of the Department of Labor order to return him to work and the decision to lay him off. There was clearly a genuine issue as to whether the layoff was in any way related to his earlier charges of discrimination. Dailey has never argued that he was laid off out of seniority, but that the actual decision to lay him and those laid off with him was itself discriminatory and retaliatory.

Court with his second motion to amend which he filed one month before the scheduled trial. This second motion was also not untimely considering the circumstances under which it was filed. This motion was denied because it was determined the case was trial ready and to allow these new claims would be like filing a new case. The District Court concluded that if Dailey wished to pursue these claims they would have to be brought in a separate suit. So instead of it being like filing a new case, Dailey was in fact forced to file a separate suit. Dailey and his counsel are hard pressed to see any logic in this reasoning except to deprive him of any claim which would have entitled him to a jury trial in *Dailey I*.

Dailey contends the first motion to amend was denied in error as a matter of the law because as he had previously argued the repeat of an act of discrimination or retaliation in the course of a continuing pattern and practice of discrimination and retaliation already pending before the court does not require the filing of a separate EEOC charge. In denying the second motion to amend, the District Court abused its discretion since there was no evidence that Respondent would have been prejudiced if Dailey had been allowed to join these claims. *See Ashe v. Corley*, 992 F.2d 540, 542-43 (5th Cir. 1993). Prejudice means more then mere inconvenience or delay. There must be a showing that to allow the amendment would unfairly disadvantage or prejudice the non-moving party. *Cuffy v. Getty Refining and Markting Co.*, No. 84-761 MMS, 11/12/86 (D. Del.). The court in *Cuffy* held that, although a plaintiff's amendments were offered 13 months after the complaint, the fact that they required the defendant to conduct further discovery was not sufficient to show prejudice, and that the motion to amend was made after the defendant's motion for summary judgment did not require denying the plaintiff's motion without some showing of lack of diligence or bad faith on the part of the movant. There was no finding of either of these circumstances by the District Court in its orders denying

Dailey leave to amend as there is no evidence of either. In light of the Fifth Circuit decision in *Gottlieb*, *supra*, in which the Circuit Court reversed a lower court's denial of a post-trial motion to reopen the question of whether there had been retaliation despite the fact there had been no filing of an EEOC charge, it is difficult to see how the District Court in the instant case can be said not to have abused its discretion when Dailey attempted to join the claim initially back in June, 1993 and again in November, 1993 one month before trial. The simple fact that the trial might have had to have been postponed or that further discovery might have been needed by Respondent was not sufficient grounds for preventing Dailey from bringing a claim which he alleged was based on common facts to those already pending before the District Court and which did not even exist until a matter of days before he filed his first motion to amend.

In truth the only party prejudiced by the District Court's denial of Dailey's motions to amend his pleadings to include the 1993 layoff claims is Dailey himself. Respondent argues that he was not denied the opportunity to pursue his layoff claims, but was simply denied the opportunity to insert them in *Dailey I*. Opposition to Petition at 15. However, as argued below, Dailey was in fact denied his right to pursue his layoff claims since the District Court later dismissed them in *Dailey II* finding that the evidence he relied upon at trial in *Dailey I* was not sufficient to show discrimination and that there was no different evidence presented in support of the July, 1993 layoff that was different from that presented at trial. The problem with this is that the District Court tried *Dailey I* after finding there was a genuine dispute of facts as to whether the original refusal to return him to work was motivated by race or retaliation without a jury, and then applied his findings when deciding to dismiss the layoff claims subsequently brought in *Dailey II*. By so doing, the District Court deprived Dailey of a jury trial on all issues and facts common to both the claims brought in *Dailey I* and *Dailey II*

in violation of this Court's holding in *Lytle v. Household Manufacturing, Inc.*, 110 S.Ct. 1331 (1990). It is extremely important to note that the District Court did not find there was no evidence to support Dailey's layoff claims in *Dailey II*, or even that there was no disputed facts, as he was not ruling on a motion for summary judgment but a motion for sanctions. The District Court only held that there was no evidence which was different from that presented in *Dailey I* which the District Court had already concluded after a non-jury trial did not prove discrimination. Petition at 21a-22a, 26a-29a. A jury could have resolved those disputed facts differently, and if it believed Dailey was discriminated against back in October, 1990 then it could conclude together with the suspicious circumstances of the layoff itself, that it too was motivated by race discrimination and retaliation. Dailey was thus in truth denied any opportunity to have his layoff claims heard in either *Dailey I* or *Dailey II*.

Since the District Court's denial of Dailey's motions to amend and join his 1993 layoff issues in *Dailey I* were in error as a matter of law and were an abuse of discretion, the decision not to allow the 1993 layoff issues in *Dailey I* must be reversed. Since the District Court substituted its findings for those of a jury on this issue when deciding to dismiss these claims from *Dailey II* pursuant to a motion for sanctions, Dailey has been deprived of his opportunity to have the July, 1993 incident and the disputed facts on which he relied heard by a jury. This Court has clearly held in *Lytle, supra,* this is not to occur even it if means retrying issues which have already been tried by the Court because the waste of judicial resources is not to take precedence over a party's constitutional rights. This Court's supervision is required in order to remedy this deprivation of a constitutional right.

**3. The October, 1992 ADA Claim.**

It was not until November 9, 1993 that the District Court dismissed Dailey's already properly joined ADA claims over the October, 1992 refusal to return him to work. This

was a year after he had filed his EEOC and Department of Labor charges, a little more then six months since conciliation efforts with the Department of Labor had begun, a little more then two months since there had been any actual negotiations with the Department of Labor or the Respondent on this issue, and after Dailey had already attended mediation in *Dailey I*. Dailey has argued and Respondent does not dispute, that while Title VII and the ADA encourage conciliation, it is not a right of a defendant. *Gamble v. Birmingham S.R. Co.*, 514 F.2d 678, 688-9 (5th Cir. 1985)(regarding Title VII). Whatismore, if conciliation efforts between the EEOC or its agent, the Department of Labor, and an employer fails, or if 180 days pass without the Commission entering a conciliation agreement, the Commission must notify the charging party of the failure of conciliation and his right to bring suit. 42 U.S.C. Sec. 2000e-5(f)(1). There is no requirement that Dailey participate in conciliation efforts indefinitely in order for him to have been said to have exhausted his administrative prerequisites or to have cooperated in good faith. By the time the District Court dismissed Dailey's ADA October, 1992 claims in November, 1993 it was well over 180 days since he had filed his EEOC or Department of Labor charges and conciliation efforts had been going on without success for six months without the Department of Labor notifying Dailey of the failure of conciliation as regards the ADA claim. This is bad enough, but when you consider the issues being raised by Dailey went back as far as October, 1990, it was an injustice to have required him to continue to attempt conciliate with the Department of Labor and the EEOC anymore then he had already. *See Weise v. Syracuse University*, 522 F.2d 397, 412 (2nd Cir. 1975). Additionally, the entire time the Department of Labor was attempting conciliation of the 1973 Rehabilitation claim it was acting as EEOC's agent as regards the ADA claim. If it was resolved the matter could then have been dismissed. If it was not it could have been tried as part

of *Dailey I*. The District Court was in error in holding that unless Dailey continued to attempt still further conciliation he would be acting in bad faith. This was not the case and there is absolutely no evidence or law in support of this finding. Dailey had done everything he was required to so, i.e., he had filed a charge of discrimination, cooperated with the investigation, and obtained a right to sue letter. Even if he had not obtained a right to sue letter, he could have brought suit since it was more then 180 days since he had filed his charges with the Department of Labor and the EEOC and they had not been resolved. Whatismore, Dailey had every reason at that point to believe that any further conciliation efforts would not resolve this matter and such a belief together with the circumstances of this case clearly did not require him to pursue further conciliation. *See Nealon*, 958 F.2d at 590 (holding employee entitled to have retaliation claim heard by court since conciliation with employer did not improve her position the first time and would be unlikely to do so a second time); *see also, Weise*, *supra*. After all Dailey had been trying to get back to work since October, 1990, it was not until April, 1993 that the Department of Labor finally found in his favor on any point he had raised, and when they did he was not put back to work, but laid off. For Dailey to have expressed his belief and presented evidence in support of the fact that further conciliation efforts over the ADA claim would be futile was not the same as him having acted in bad faith as he was accused of by the District Court.

When the Department of Labor finally issued its notice of failure of conciliation on the ADA charge, instead of referring it to the EEOC, it deferred to the pending litigation since the EEOC had already issued a right to sue letter on the ADA issue. Dailey once again attempted to join the ADA claim in *Dailey I*, but was denied on December 17, 1993 because the Respondent's representative had represented to the District Court that the EEOC was willing to attempt further conciliation and because his lawsuit was too near to

trial. In fact the only reason the EEOC was willing to continue further conciliation was because Respondent's representative had informed them they had been ordered to do so by the District Court. The sole reason Respondent wanted to continue with what had already been unsuccessful negotiations over the ADA claim was to prevent Dailey from being able to have any of the facts underlying his race discrimination and retaliation claims heard by a jury. Respondent had no intention of making any further offers. When conciliation was scheduled with the EEOC Respondent failed to show up with the exception of a 10 minute telephonic appearance by Respondent's counsel who made no further offers other then what had been offered back in August, 1993.

The District Court in its November 9, 1993 order dismissing Dailey's October, 1992 ADA claim found that "because the EEOC, had it known of Plaintiff's earlier OFCCP complaint, would have declined [Dailey's] ADA complaint, it would not have issued a right to sue notice." Petition at 8a. This was incorrect; however, because the only time this would have occurred would have been when the only claim raised by Dailey in his charge with the Department of Labor was that of disability discrimination. 41 C.F.R. Part 60-742.5(a)-(g). Since Dailey's charge as filed with the Department of Labor included individual claims of race discrimination and retaliation and did not involve any allegations of a violation of the affirmative action section of the Rehabilitation Act, the Department of Labor was suppose to refer everything, including the ADA claims to, the EEOC. 41 C.F.R. Part 60-742.5(a)-(g). Whatismore, although not necessary to these proceedings, Dailey discovered after appeal had been instigated through a delayed response to a freedom of information act request of the Department of Labor that the EEOC was fully aware of Dailey's dual-filed claims back in December, 1992 and had informed the Department of Labor that it would defer to them for 60 days after which time it

went ahead and issued its right to sue letter on the ADA issue. Appendix A. Dailey did nothing improper in this case. He did everything he was suppose to do. The EEOC, the Department of Labor, the Respondent, and the District Court, however, have not.

It was an abuse of discretion and error as a matter of law for the District Court to dismiss Dailey's October, 1992 ADA claims from *Dailey I* on the sole basis that Dailey was required to continue further conciliation efforts beyond what he had already participated in prior to the dismissal of his claims in November, 1993 since the Fifth Circuit law and the statutes pertaining to the handling of these charges clearly hold that Dailey could have filed his suit anytime after 180 days if conciliation was not successful, right to sue letter in hand or not, and that there is no right to conciliation in the Respondent. Again the failure to follow the law as relates to these claims has deprived Dailey of his constitutional right to a jury trial on all issues common to his equitable and legal claims.[3]

**B. DAILEY WAS NEVER ALLOWED TO ASSERT HIS LEGAL CLAIMS AND THEY WOULD NOT HAVE BEEN DISMISSED ON SUMMARY JUDGMENT.**

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3 Respondent would dispute this since it would argue that the District Court later dismissed this ADA claim pursuant to a motion for summary judgment and that it would not have been heard in *Dailey I* anyway. The District Court's basis for this decision was that Dailey was not disabled under the ADA. Dailey contends the District Court was in error. He would argue an employee with a documented herniated disk and resulting lifting restrictions, whose worker's compensation claim was upheld, who the Department of Labor found to have been disabled, and who was treated as though he could not do his job or any other for that matter by his employer when in fact he was fully capable of doing his job is clearly disabled. A Petition for Writ of Certiorari is being prepared on this issue at this time and will be filed shortly.

Dailey has shown that all of his claims were related to one another and were part of a continuing violation, and that the facts upon which he relied to prove his equitable claims were for the most part the same facts he relied upon to prove his legal claims. Dailey has also shown that the District Court was in error as a matter of law in not allowing Dailey to pursue any of his legal claims in *Dailey I*. By improperly dismissing his legal claims which were dependent on common facts to those supporting his equitable claims, trying his equitable claims, and then dismissing his legal claims brought in *Dailey II* and *Dailey III* on the grounds that they had already been decided in *Dailey I*, the District Court was in clear violation of this Court's holding in *Lytle*. But for the District Court's erroneous dismissal of all of Dailey's legal claims, Dailey would have been able to have a jury decide all facts common to both his legal and equitable claims in either *Dailey I, II* or *III*.

Respondent argues that *Lytle* is not applicable to the instant case, because the plaintiff in that case brought both a Title VII and a Sec. 1981 claim over a single event. The fact that Dailey's legal and equitable claims did not center around the exact same act of discrimination as they did in *Lytle*, but were part of an allegedly continuous pattern and practice claim including several separate acts, is irrelevant. The issue looked at in *Lytle* was whether the facts underlying both claims were the same, not whether the underlying allegedly discriminatory events were the same. A plaintiff may bring several different causes of action based on several different acts, but if they all are dependent to some extent on the determination of the same underlying disputed facts, then a court may not split them and try the equitable claims first and then apply the doctrines of res judicata or collateral estoppel to avoid a trial of the same facts over the legal claims. Dailey's claims surrounding his October, 1990 and October, 1992 incidents were both dependent on what his restrictions were, whether his restrictions prevented him from doing his

job, and whether his having participated in protected activities or his race had anything to do with the decisions not to allow him to work. In turn, whether or not Dailey was being discriminated or retaliated against at these times is relevant to whether he was still being retaliated or discriminated against in July, 1993.

Respondent next argues that since Dailey was allowed to pursue his dismissed claims in other suits, his constitutional right to a jury trial was not denied. This is a circular argument since Dailey's argument is that the District Court improperly applied the doctrines of res judicata and collateral estoppel to his other suits, *Dailey II* and *Dailey III*, thereby depriving him of any right to a jury trial even on his legal claims solely as a result of its improper dismissal of the claims from *Dailey I* and its improper decision to try the issues in *Dailey I* before Dailey's legal claims. *See Lytle, supra.* Dailey would not be complaining if he had been given the opportunity to try his legal claims in *Dailey II* and *Dailey III*. It is a fact the District Court applied its findings in *Dailey I* in deciding whether there was any evidence to support the claims in *Dailey II* and *Dailey III*. The District Court did not hold that Dailey could not pursue his claims in *Dailey II* and *Dailey III* because there were no genuine issues of fact, but simply that it had already decided any genuine issues of fact in *Dailey I* and that those facts in its opinion did not prove discrimination had occurred. Petition 21a-29a. By doing so Dailey was in fact and without question deprived of his right to a jury trial on his legal claims since the District Court should not have determined the facts underlying these claims. It is important to note that Dailey's legal claims, with the exception of the October, 1992 ADA claims were not dismissed as a result of a motion for summary judgment as alleged by Respondent, but while ruling on a motion for sanctions and because the District Court felt Dailey should have known the doctrines of res judicata and collateral estoppel would apply.

When Dailey was unable to bring his October, 1992 ADA claims and his July, 1993 layoff Title VII and ADA claims in *Dailey I*, he was forced to bring them in separate suits; *Dailey III* and *Dailey II*, respectively. The District Court specifically required this be done as these claims were dismissed without prejudice. Petition at 11a-12a; 18a-19a. When Dailey was required to separate these events from those set forth in *Dailey I*, he decided to include claims over these same events under 42 U.S.C. Sec. 1981. The District Court dismissed the 42 U.S.C. Sec. 1981 claims on the basis of res judicata holding that Dailey could have brought this cause of action in *Dailey I*. Dailey contends this is in fact possible; however, he is also entitled to bring all causes of action arising out of the same transaction in one suit. Since the District Court had already split Dailey's claims by requiring he bring his October, 1992 ADA and July, 1993 Title VII and ADA claims in subsequent suits he was entitled to bring his Sec. 1981 cause of action over the same events in those subsequent suits without fear of the doctrine of res judicata. It would make no sense to allow the 42 U.S.C. Sec. 1981 claims over these events in *Dailey I* while at the same time requiring the Title VII and ADA claims over the same incidents be brought in a separate suit.

Additionally, when the subject matter of a prior claim deals only with issues occurring prior in time to those brought in the second suit, the doctrine of res judicata should not apply. *Kavanaugh v. Sperry Univac*, 511 F. Supp. 705, 706 (ND Ill 1981), *aff'd without op*, 729 F.2d 1464 (7th Cir.), *cert denied*, 81 L.Ed.2d 370, 104 S.Ct. 2665. In the instant case the subject matter of *Dailey I* dealt with events which occurred prior in time to those brought in *Dailey II* and *Dailey III*. The actual events raised in *Dailey II*, and in *Dailey III* were not the same as those raised in *Dailey I*. Although Dailey argued that they were interconnected, part of a continuing violation, and were dependent on the same facts as those in *Dailey I*, they involved different separate acts on

the part of the Respondent occurring subsequent to those claims brought in *Dailey I*. The District Court was on the one hand arguing the claims were not related to one another and therefore required separate EEOC charges before they could be brought, and on the other hand arguing, they are related to one another and any causes of action arising out of the later events should have been brought in the first suit. Again the logic is lost on Dailey and his counsel.

## CONCLUSION

The District Court was in error as a matter of law in failing to allow Dailey to bring any of his legal claims in *Dailey I* and then applying its findings of the disputed facts common to both his legal and equitable claims in order to dismiss his legal claims brought in subsequent suits. This was in direct violation of this Court's holding in *Lytle*. The District Court also improperly imposed sanctions based on its improper application of the doctrines of res judicata and collateral estoppel in violation of *Lytle*. The Fifth Circuit, although upholding the District Court's rulings, has not accused Dailey of bringing a frivilous appeal or set forth any reason why Dailey's arguments are invalid, but has simply chosen to ignore his arguments. As such, the violation of Dailey's constitutional rights have gone unchecked. The deprivation of a constitutional right and the failure of the lower courts to follow the law require this Court to apply its powers of supervision in order to prevent an injustice from occurring. The only remedy adequate to cure the deprivation of Dailey's constitutional rights is to reverse all the decisions complained of, to remand the entire case for trial before a jury, and to set aside the sanctions.

Respectfully submitted,

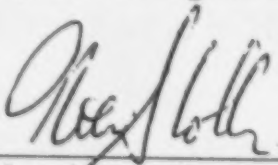
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**CERTIFICATE OF SERVICE**

This is to certify that a three true and correct copies of the foregoing documents was mailed to opposing counsel, Maureen Moore, on October 31, 1996 via regular U. S. mail.



Noemi A. Collie, Esq.

## APPENDIX A

CHRONOLOGY LOG

NAME & ADDRESS OF
CONTRACTOR/COMPLAINANT
Ollie Dailey v. Vought Aircraft Company
P.O. Box 655907 Dallas 75265-5907
NAME OF CHIEF EXECUTIVE OFFICER & PHONE NUMBER
NAME OF EEO COORDINATOR & PHONE NUMBER
Gil Barfield

Date: 12-2-92 Person Contacted: G. Barfield
Summary of Discussion or Action: Requested information from company to investigage complaint
EOS Name (Printed): Nash
Date: 12-9-92 Person Contacted: Nash
Summary of Discussion or Action: Recd co ltr 12/8/92 re charge filed w/EEOC
EOS Name (Printed): G. Barfield
Date: 12-17-92 Person Contacted: G. Barfield
Summary of Discussion or Action: Advised the charge will be held in abeyance 60d. pending OFFCP's investigation. EEOC requested to be part of any settlement agreement that is reached. (EEOC ltr 12/15/92)
EOS Name (Printed): Jacqualine R. Bradley, DD EEOC
Date: 12-17-92 Person Contacted: G. Barfield
Summary of Discussion or Action: He will send info as soon as they can put it together. See note to file.
EOS Name (Printed): Nash
Date: 12-24-92 Person Contacted:
Summar of Discussion or Action: assigned to co #147
EOS Name (Printed): [unintelligible]
Date: 1/26/93 Person Contacted:

Summary of Discussion or Action: Ext request to DD. Ext reqested to 3/3/0/93
EOS Name (Printed): M. Bouis
Date: 1/25/93 Person Contacted:
Summary of Discussion or Action: Rec'd 1/21/93 ltr from contractor - position paper - w/atty.
EOS Name (Printed): M. Bouis
Date: 2/3/93 2/23/93 Person Contacted: TRC
Summary of Discussion or Action: See memo/record. See [unintelligible] record
EOS Name (Printed):
Date: 2/25/93 Person Contacted:
Summary of Discussion or Action: Recd [unitelligible] EEOC - Notice to Sue - ADA
EOS Name (Printed):
Date: 2/26/93 Person Contacted: [unitelligible]
Summary of Discussion or Action: See [unintelligible]
EOS Name (Printed):
Date: 3/1/93 Person Contacted:
Summary of Discussion or Action: See [unintelligible] record
EOS Name (Printed):